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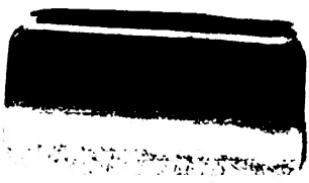
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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

W. W. COPE,
REPORTER.

VOLUME 70.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1906.

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* Appointed April 19, 1887, to succeed Hon. R. F. Morrison, deceased.

† Succeeded Hon. E. M. Ross, resigned.

‡ Succeeded Hon. S. B. McKee and Hon. M. H. Myrick, whose terms of office expired January 3, 1887.

§ Appointed April 26, 1887, to succeed Hon. Niles Searls, appointed Chief Justice.

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ORGANIZATION OF SUPREME COURT.

[Constitution, article 6, section 2.]

§ 2. The Supreme Court shall consist of a chief justice and six associate justices. The court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions hereinafter contained in relation to the court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any

four justices may, either before or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

SUPREME COURT COMMISSIONERS.

[Statutes 1885, page 101.]

§ 1. The Supreme Court of the State of California, immediately upon the taking effect of this act, shall appoint three persons of legal learning and personal worth, as commissioners of said court. It shall be the duty of said commissioners, under such rules and regulations as said court may adopt, to aid and assist the court in the performance of its duties, and in the disposition of the numerous causes now pending in said court undetermined. The said commissioners shall hold office for the term of four years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of said court, payable at the same time and in the same manner. Before entering upon the discharge of their duties, they shall each take an oath to support the Constitution of the United States and the Constitution of the State of California, and to faithfully discharge the duties of the office of commissioner of the Supreme Court to the best of their ability. The said court shall have power to remove any and all members of said commission at any time, by an order entered on the minutes of said court, and all vacancies in said commission shall be filled in like manner.

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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

[No. 20181. Department One.—May 28, 1886.]

EX PARTE ROBERT MITCHELL, ON HABEAS CORPUS.

CRIMINAL LAW — ASSAULT WITH DEADLY WEAPON — PUNISHMENT OF — CONSTITUTIONAL LAW. — The punishment for an assault with a deadly weapon provided for by section 245 of the Penal Code is not excessive, cruel, or unusual within the meaning of section 6 of article 1 of the constitution.

ID. — SUFFICIENCY OF VERDICT — JUDGMENT — IMPRISONMENT IN STATE PRISON. — *People v. Turner*, 65 Cal. 540, affirmed as to the point that where a party is informed against for an assault with intent to commit murder, and a verdict is rendered against him for an assault with a deadly weapon, the verdict is sufficient to support a judgment of imprisonment for two years in the state prison, without stating that the assault was made with the intent to commit great bodily harm.

ID. — IMPRISONMENT AS MEANS OF ENFORCING FINE. — The petitioner was convicted of an assault with a deadly weapon, and sentenced to imprisonment in the state prison for two years, and to pay a fine, and to be imprisoned in the same prison one day for every dollar of the fine. *Held*, that conceding the portion of the judgment providing for imprisonment as a means of enforcing the fine was invalid, the sentence of imprisonment as a punishment was valid, and should be enforced.

The petitioner was charged by an information with the crime of an assault with intent to commit murder. To this information he pleaded not guilty, was tried by

a jury who rendered a verdict against him of guilty of an assault with a deadly weapon. The judgment of the court was that he be imprisoned in the state prison at San Quentin for the term of two years, "and in addition thereto, he pay a fine of four thousand dollars, and be imprisoned in said state prison one day for every dollar of said fine," etc. The application was for a writ of *habeas corpus* to discharge him from his confinement under this judgment.

Carroll Cook, for Petitioner.

The punishment provided by section 245 of the Penal Code for the crime of an assault with a deadly weapon exceeds the penalty affixed to the greater offenses of assault to murder or manslaughter. The punishment is therefore excessive within the meaning of section 6 of article 1 of the constitution. (Cooley's Const. Lim. 377.) The judgment and commitment under which the petitioner is held are void, because it recites a verdict which does not find the petitioner guilty of any felony, but solely of a misdemeanor, for which no imprisonment is authorized in a state prison. The judgment is void in that it provides for the imprisonment of the petitioner in the state prison as a means of enforcing the fine. Under section 245 of the Penal Code, a punishment by fine cannot be imposed in addition to a punishment by imprisonment in the state prison. A fine can only be imposed where the imprisonment is ordered to be had in the county jail.

S. P. Hall, contra.

The COURT.—1. The punishment authorized by section 245, Penal Code, is not excessive, cruel, or unusual within the meaning of section 6, article 1, of the constitution.

2. *People v. Turner*, 65 Cal. 540, to which we adhere, disposes of the second point made for petitioner.

3. The entire judgment is not void. That portion of it providing for imprisonment as a means of enforcing the payment of the fine is separable from the rest. The sentence to imprisonment as a punishment is in force, and the petitioner cannot now be discharged, whatever may hereafter be his rights regarding the order of imprisonment as to the fine. Whether he will be entitled to a discharge on the expiration of the two years, we indicate no opinion.

The petitioner is remanded, and the writ discharged.

[No. 8804. In Bank.—May 28, 1886.]

L. MCNALLY ET AL., APPELLANTS, v. OWEN CONNOLLY, RESPONDENT.

FIXTURES — LESSOR AND LESSEE — DEBTOR AND CREDITOR. — An engine, boiler, and machinery for a flouring mill, erected by a lessee on the demised premises, and securely attached thereto by bolts and screws, are fixtures as between him and his attaching creditors, notwithstanding an agreement between the lessor and lessee that the latter should be at liberty to remove the machinery upon the expiration of the lease.

Id. — REMOVAL OF FIXTURES — CONVERSION INTO PERSONALTY. — The severance and removal of the fixtures by the lessee converts them into personalty.

Id. — ACTION TO RECOVER POSSESSION — DEMAND. — No demand is necessary before bringing suit to recover the possession of the fixtures after their wrongful severance and removal by the lessee.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Charles F. Hanlon, and W. C. Flint, for Appellants.

M. Mullany, for Respondent.

Ross, J.—Whether the title to the property in question passed to the plaintiffs in the present action depends

upon its character at the time of the levy of and sale under the execution issued in the case entitled *McNally et al. v. Connolly & Wheat*,—that is to say, whether as between the plaintiffs, who were the creditors, and Connolly & Wheat, who were the debtors, the property was realty or personalty.

The facts of the case are these:—

In 1876 the defendant took a lease of a certain lot of land in the city of San Francisco for a term which was to expire January 1, 1881. Upon the lot there was a brick building which covered most but not all of it. Connolly paid the rent for the term in full, formed a partnership with Charles D. Wheat, and the copartners, under the firm name of Connolly & Wheat, thereupon proceeded to place upon the lot an engine, boiler, and machinery for a flouring mill. It is this machinery that forms the subject-matter of the present action.

The engine and boiler were erected in a wooden building adjoining the brick structure, and the motive power was communicated therefrom to the machinery by means of a shaft or shafts extending into and through the brick structure.

The foundation of the engine and boiler was made by sinking timbers in the ground from six inches to two feet, upon which a brick foundation was built, and the bed of the engine was placed upon the brick-work, and fastened to the wooden foundation beneath by bolts and screws. The mill-stones were bolted fast to the floor. Pieces of timber were put in the brick walls, and bolted through in the upper part of the building, to which the machinery was attached. The whole machinery seems to have been securely attached to the building, and to have been solid and substantial but was secured and fastened usually by bolts and screws, which could be removed without material injury to the building, while some bridges were bolted directly to the walls. The principal difference in securing the machinery from that

ordinarily pursued consisted in using bolts with screws instead of nails. It was placed in the building with the understanding between the lessor and the lessee that the latter should be at liberty to remove it, and it was with that end in view that it was attached as above stated, in order that it might be severed with the least possible injury to the realty.

In 1877 plaintiffs herein brought an action against Connolly & Wheat to recover \$2,966.16, and caused a writ of attachment to be duly issued in the action, which was levied upon the right, title, and interest of the defendants to the suit in and to the lot of land and premises so leased as aforesaid.

The sheriff also, by direction of the plaintiffs, at the same time attached the machinery as personal property.

Plaintiffs had judgment in the action, and thereafter caused an execution to issue, under which the sheriff levied upon the lot of land having the mill and machinery thereon, and afterward, on the nineteenth day of October, 1877, sold the same in due form as *real estate*,—plaintiffs becoming the purchasers,—and no redemption being had, on the fourth day of May, 1878, they received a sheriff's deed in due form of said land and premises.

Just prior to the expiration of the lease, that is to say, in December, 1880, Connolly detached and removed the mill and machinery, whereupon the present action was brought against him to recover its possession, or in the event its delivery cannot be had, its value.

The fact that, as against the lessor, Connolly & Wheat had the right upon the expiration of the lease to remove the machinery is unimportant. The question here is, How does the law regard it as between debtor and creditor? It is provided by statute in this state, that "a thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently

attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws." (Civ. Code, sec. 660.) It is clear that under this definition the mill and machinery in question constituted fixtures.

It does not admit of doubt, we think, that had Connolly and Wheat, on the day of the execution sale against them, executed to the plaintiffs a deed of all their right, title, and interest in and to the lot of land upon which the mill and machinery were erected, the latter would have passed by the deed to the plaintiffs. We know of no principle by which a different result can be held to follow a forced sale against them, from which no redemption was had. It results from these views that the title to the property in question vested in the plaintiffs upon the execution of the sheriff's deed. That being so, the subsequent severance and removal of the property by the defendant Connolly was a conversion of it into personality. (*Sands v. Pfeiffer*, 10 Cal. 258.) And as the severance and removal by defendant was wrongful, no demand before bringing suit was necessary.

Judgment and order reversed, and cause remanded for a new trial.

MCKINSTRY, J., THORNTON, J., MORRISON, C. J., and SHARSTEIN, J., concurred.

Rehearing denied.

[No. 8361. In Bank.—May 28, 1886.]

JOHN O'KANE, APPELLANT, *v.* GEORGE HYDE, RESPONDENT.

ASSIGNMENT FOR BENEFIT OF CREDITORS — PARTNERSHIP — PREFERENCE GIVEN TO FIRM CREDITORS. — An assignment for the benefit of creditors, made by a partnership, of their individual as well as of their partnership property, is void as to creditors, if a preference is given to the partnership creditors over the individual creditors as to the individual property.

ID.—VALIDITY OF ASSIGNMENT — GARNISHED DEBTOR MAY DISPUTE.

— On the 22d of March, 1879, the firm of Daly & Hawkins made an alleged assignment for the benefit of their creditors to the plaintiff. At that time, the defendant, George Hyde, was indebted to the firm of Daly & Hawkins on two promissory notes in the sum of \$3,445, and the firm were indebted to the Hibernia Savings and Loan Society in the sum of \$6,000. On the 27th of March, 1879, in an action brought by the Hibernia Savings and Loan Society against Daly & Hawkins, the debt due by Hyde to them was garnished, and was subsequently paid by him in satisfaction of the judgment recovered in the action by the Hibernia Savings and Loan Society. On the 10th of April, 1879, the assignee, O'Kane, commenced an action against Daly & Hawkins, the Hibernia Savings and Loan Society, and other general creditors of Daly & Hawkins, to be discharged of his trust, and in the complaint therein enumerated the notes as among the assets delivered to him by Daly & Hawkins. The Hibernia Savings and Loan Society in its answer denied the right of O'Kane to be discharged of his trust, and prayed that the assignment be adjudged void. On the 7th of October, 1880, an order was made by the superior judge before whom the suit was pending, directing O'Kane to bring an action against the defendant Hyde for the collection of the notes. The present action was thereupon brought. The answer of the defendant set up the payment of the notes under the garnishment to the Hibernia Savings and Loan Society, and alleged that the assignment to the plaintiff was void because it gave a preference to the partnership creditors of Daly & Hawkins over the individual creditors as to the individual property. On the 4th of December, 1880, a judgment in the case of *O'Kane v. Daly et al.* was rendered, discharging the plaintiff from his trust as assignee. Held, that the action of *O'Kane v. Daly et al.* was not, as to the defendant or the Hibernia Savings and Loan Society, an adjudication as to the validity of the assignment, and that the defendant could dispute its legality.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The action was brought to recover the amount alleged to be due on certain promissory notes. The further facts are stated in the head-notes and opinion.

Edward P. Cole, for Appellant.

Tobin & Tobin, for Respondent.

MYRICK, J.—The court below construed the assignment by Daly & Hawkins to O'Kane as an assignment of their individual as well as of their partnership prop-

erty, and as it directed all of the property assigned to be applied to the payment of partnership debts, held the assignment void as thus giving a preference to the partnership creditors over the individual creditors as to the individual property.

We are of opinion this construction is correct, and that the assignment was void as to creditors. The defendant, Hyde, was a debtor of the assignors; the Hibernia Savings and Loan Society was their creditor; as such creditor, is recovered of Hyde, by garnishment proceedings, the amount of its debt due from the assignors. Hyde, by reason of his relation to the society under the garnishment proceedings, and his payment to it under such proceedings, could make inquiry into the legality of the assignment.

We are of opinion that the former action, *O'Kane v. Daly & Hawkins*, was not, as to the defendant herein or as to the Hibernia Savings and Loan Society, an adjudication as to the validity of the assignment.

Judgment and order affirmed.

SHARPSTEIN, J., MORRISON, C. J., and MCKINSTRY, J., concurred.

Rehearing denied.

[No. 20074. In Bank.—May 31, 1886.]

THE PEOPLE, RESPONDENT, *v.* FONG AH SING, APPELLANT.

NEW TRIAL — NEWLY DISCOVERED EVIDENCE. — Where the evidence given on the trial is conflicting, newly discovered evidence merely cumulative will not warrant a new trial.

PRACTICE — JUROR — NON-RESIDENCE — GENERAL CHALLENGE FOR CAUSE — EXCEPTION. — A challenge to a juror on the ground that he is not qualified to serve by reason of his non-residence in the county in which the trial is had is a general challenge for cause, for the disallowance of which no exception is provided for by the Penal Code.

CRIMINAL LAW — INTERPRETER MAY BE WITNESS. — A person appointed to act as an interpreter on the trial of a criminal action is not disqualified by reason of the fact that he was a witness for the prosecution.

ID. — EVIDENCE — QUESTION. — On the examination of a witness, counsel cannot insert in a question a statement as having been made by the witness which had not in fact been made by him.

ID. — LEADING QUESTION — DISCRETION. — It is within the discretion of the trial court to allow leading questions to be put to a witness on his examination in chief.

ID. — MURDER — DYING DECLARATIONS — WRITTEN STATEMENT — PAROL EVIDENCE. — In a prosecution for murder, where dying declarations of the deceased have been reduced to writing, parol evidence is admissible to show the condition of deceased when the declarations were made. Such evidence does not add to or contradict the written statement.

ID. — ENTIRE CONTEXT OF DECLARATION MUST BE GIVEN. — A statement in a dying declaration disconnected from the context, and contradictory to the general import thereof, is inadmissible in evidence unless the whole of the context is given.

ID. — ADMISSIBILITY OF DYING DECLARATIONS. — Dying declarations to be admissible must relate to the act of killing or to the circumstances immediately attending it and forming part of the *res gestae*.

ID. — EVIDENCE — IMMATERIAL ERROR. — The refusal of the court to permit a proper question to be answered is not a material error if the witness in another portion of his testimony fully answers the question.

ID. — IMPEACHMENT OF WITNESS — EVIDENCE OF HOSTILITY. — On a trial for murder, where the defendant is proved to have been previously arrested and charged with arson, a question as to who instigated the arrest is inadmissible in the absence of evidence or the offer of evidence connecting any witness for the prosecution with the arrest.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

L. Quint, for Appellant.

Attorney-General Marshall, for Respondent.

McKINSTRY, J. — The defendant was found guilty of murder in the first degree, and his motion for a new trial was denied. He has appealed from the judgment and order.

The motion for a new trial was based on the ground, amongst others, of newly discovered evidence. The de-

fendant has been twice tried and convicted, and the new evidence was discovered, as is alleged, after the second trial. One of the affidavits is to the effect that the defendant was known to the affiant; that affiant was present when the deceased was shot, and is quite certain the shot was not fired by the defendant. Another affidavit corroborates many of the principal statements of the first. A third states certain circumstances tending to support the averments contained in the others.

Kwong Ah Him, Leong Ah Ngow, and Harm Ma Look, witnesses for the prosecution, swore at the trial that they saw the defendant fire the shot which killed the deceased. Hoong Ah Karng testified to the defendant's retreat from the place where the shot was fired, and that he threw away a pistol, which the witness picked up. The deceased in her dying declaration identified the defendant as her slayer.

At the trial, Chum Sun, a witness for the defense, testified positively that the defendant was not the person who fired the shot; that such person was dressed differently from the manner in which other evidence tended to show the defendant was dressed on the evening when the killing occurred, and was about a head shorter than defendant. Edward Durham, called by the defense, testified that the person who fired the shot was smaller and shorter than the defendant. Both he and Chum Sun swore that the person who fired the shot fled toward Pacific Street; therein differing from other witnesses for defendant, and from the affidavits of the newly discovered witnesses, which state that he went in another direction. The defendant testified that he was not present when the shot was fired.

The evidence alleged to be newly discovered was strictly cumulative. It is well settled that in cases of conflicting testimony, newly discovered evidence merely cumulative will not furnish ground for new trial. Even if a case can be supposed where, although the evidence

be merely cumulative, a new trial should be granted, the circumstances here presented cannot be justly claimed to constitute an exception to the rule. We cannot say but that the court below was justified in its action with reference to the alleged newly discovered evidence.

Appellant contends that the juryman Prentis Selby was not qualified to serve as such. The challenge to the juror was on the ground that he was not a resident of the city and county of San Francisco when the trial was had.

A challenge for cause is an objection to a particular juror, which is either general,—that he is disqualified from serving in any case; or particular,—that he is disqualified from serving in the action on trial. (Penal Code, sec. 1071.) The Penal Code provides for no exception to the action of the court in disallowing a general challenge for cause to an individual juror. (Penal Code, sec. 1170.)

We must assume that Louis Locke possessed the necessary knowledge of the English and Chinese language, and that he discharged the duties of interpreter fairly and impartially; that he was a witness for the prosecution did not of itself disqualify him.

Appellant claims that the court below erred in not permitting that portion of the following question to the witness Hong Ah Kwong which is enclosed in brackets: "Do you say you saw Fong Ah Sing run down the street, heard a shot, and you saw him throw that pistol away [and you heard a woman was shot], and that you heard nothing more, or knew nothing more about the case?"

The court said: "That part where 'you heard the woman was shot' is unauthorized and improper. The witness testified he did not know of it for a long time after." And the witness then said: "It was over a week after that I first learned that Choy Cum, the woman on Cum Cook Alley, had been shot," etc. When the question was put to the witness, and before the remark of the

judge, counsel for the prosecution said: "He did not say he heard the woman was shot, but on the trial [*sic*] he did not hear it until a long time after." We think the court was justified in holding that counsel for defendant was not authorized to insert in a question a statement as having been made by the witness which had not in fact been made by him. But even if the remark of the judge was irregular, defendant did not except to the remark, but to the disallowance of part of the question.

During the examination of the witness Louis Locke, he testified that before the taking down of the dying declaration of the deceased, she was asked if she thought she would live. She replied, "No; I am dying now. Don't you see I am dying?" And afterward the witness Locke was asked: "And then she was asked, 'Do you expect to live?' and she said, 'What?'" This question was objected to by counsel for defendant as leading, improper, and incompetent. The objection having been overruled, the witness answered: "Do you think you will live?" She said, "No; I am dying now. Don't you see I am dying?" Here was no error. The matter of the form of a question is in the discretion of the trial court. Moreover, the witness had made the same statement in response to a question *not* leading.

Nor, as suggested, was this adding to or contradicting the written statement. The testimony related to the condition of the witness when the alleged dying declarations were made.

There was sufficient foundation in the evidence for the admission of the declaration in writing.

Counsel objected to the introduction of the written statement, unless the whole of it was introduced, or unless that portion of it should be given to the jury which reads, "I don't know any reason that Fong Ah Sing had for shooting me."

When the case was here on the former appeal, it was held that the following portion of the dying declaration

was inadmissible: "I don't know of any reason that Fong Ah Sing had for shooting me, *unless it was* that a few days before the shooting I was bathing my feet upstairs over a room in which Fong Ah Sing was sitting, and spilled a little water on the floor, and it leaked through and fell upon Fong Ah Sing. Fong Ah Sing was very angry thereat, and told the proprietor of the house that I must apologize and make him some present, to prevent bad luck coming upon the house. The proprietor did make some little present to Fong Ah Sing, and I supposed the matter was settled." (64 Cal. 255, 256.)

It would seem manifest that as the whole of the foregoing is connected, and when taken together is a statement that deceased did know of a fact which might have constituted a cause for the shooting, a portion of it which, taken separate from the context, would imply that she knew of no reason for the shooting was not admissible. Besides, dying declarations are restricted to the act of the killing, and to the circumstances immediately attending it and forming a part of the *res gestæ*. (64 Cal. 255, 256.)

During the examination of the defendant as a witness, he was asked by his counsel, "What society, or what branch of the Chinese societies, were arraigned [sic] against your society?"

The court sustained an objection to the question.

The witness, however, testified that there was a feud between the Duck Kong Tong Society, to which he belonged, and the Gee Gong Tong Society. And in another place: "I never stay very much in Chinatown, except walk along, because I have lots of enemies against me because I am the interpreter of the society. The Gee Gong Tong Society is against ours."

The question was fully answered.

The witness Morton, called by the defendant, testified that he was a resident of Vallejo and a constable. Counsel for defendant asked of him, "Do you know of defend-

ant being arrested and charged there in Vallejo with arson?" To which the witness answered affirmatively. He was asked, "At whose instigation?" The prosecution objected to the last question; the court sustained the objection, and the defendant excepted to the ruling.

Prima facie, the question was irrelevant. Counsel for defendant did not offer to prove that the arrest for arson was instigated or brought about by any witness for the prosecution, or any organization or society hostile to the defendant with which any witness for the prosecution was connected. It would be difficult to say that if this had been shown it would have tended to establish a conspiracy to pursue the defendant upon a false charge of murder. And in the absence of evidence or offer of evidence connecting any witness for the people in this action with the arrest at Vallejo, the answer to the question could not have tended to destroy the credibility of any witness herein.

Judgment and order affirmed.

SHARPSTEIN, J., Ross, J., MYRICK, J., MORRISON, C. J., THORNTON, J., and McKEE, J., concurred.

Rehearing denied.

[No. 9974. In Bank.—May 31, 1886.]

C. R. BROWN ET AL., RESPONDENTS, *v.* E. J. GRIFFITH ET AL., APPELLANTS.

EVIDENCE — PUBLIC RECORDS. — The books of a recorder's office are not admissible in evidence to prove the execution and contents of instruments which have been duly recorded, unless the absence of the originals is first explained or accounted for.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Wharton & Shaw, and *J. R. Webb*, for Appellants.

D. W. Tupper, and *Sayle & Harris*, for Respondents.

McKINSTRY, J.—At the trial, the plaintiffs produced books of the recorder of Fresno County, and offered in evidence matter recorded on certain pages thereof, for the purpose of proving the execution and contents of conveyances, and of a power of attorney to convey real estate. The defendants objected to the record as not the best evidence, and as not being admissible to prove the execution and contents of the instruments, until the absence of the original was explained or accounted for. The objection was overruled. This was error.

By section 1894 of the Code of Civil Procedure public records of private writings are included in "public writings." Section 1893 of the same code, as originally passed, provided: "Every public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him on demand a certified copy of it, on payment of the legal fees therefor, and such copy is primary evidence of the original writing."

July 1, 1874, section 1893 was amended so as to read as follows:—

"Every public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him on demand a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence *in like cases* and with like effect as the original writing."

Section 1951 was added to the Code of Civil Procedure on the day last mentioned. That section is:—

"Every instrument conveying or affecting real property, acknowledged or proved and certified as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding without further proof; and a certified copy of the record of such conveyance or instrument

thus acknowledged or proved may also be read in evidence, with the like effect as the original, on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the certified copy."

The section relates to the precise subject, fixes the rule, and determines under what circumstances and upon what proof the certified copy of the record of a private conveyance or instrument affecting real property is admissible. *Canfield v. Thompson*, 49 Cal. 210, was decided on facts occurring before section 1951 was adopted. Since its adoption, it is plain that section 1893 (in so far as it makes certified copies admissible "with like effect as the original writing" primary evidence) relates to certified copies of public writings other than those mentioned in the fourth subdivision of section 1894.

The fourth subdivision of section 1855, which provides that a certified copy of a record is admissible "when a certified copy of the record is made evidence by this code," etc., does not affect the question here considered, because the certified copy is made evidence by the code only after the preliminary proof.

The sections of the Code of Civil Procedure above referred to do not by their terms relate to the record of conveyances. It is by virtue of section 1919 of the same code ("A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record") that a record of a private writing is evidence. By that section the record is placed upon the same footing as a certified copy of it. But the record only proves itself as a *record*. The record is not made primary evidence of the original writing. If the record is evidence of the execution and contents of the original writing, it is evidence only in the same cases in which a certified copy would be evidence,—that is, after proof that the original writing is not under the control of the party offering the record or certified copy.

Judgment and order reversed, and cause remanded for a new trial.

SHARPSTEIN, J., THORNTON, J., MYRICK, J., MORRISON, C. J., Ross, J., and McKEE, J., concurred.

[No. 20150. In Bank.—May 31, 1886.]

THE PEOPLE, APPELLANT, *v.* WILLIAM HORN, RESPONDENT.

CRIMINAL LAW — ONCE IN JEOPARDY. — If a party is once placed upon trial before a competent court and jury upon a valid indictment, the jeopardy attaches, to which he cannot be again subjected, unless the jury be discharged from rendering a verdict by a legal necessity, or by his consent; or in case a verdict is rendered, if it be set aside at his instance.

ID. — APPEAL BY PEOPLE — INSTRUCTION TO ACQUIT. — If through misdirection of the judge in matter of law a verdict is improperly rendered, it can never afterward on application of the prosecution in any form of proceeding be set aside; and where the court instructs the jury to acquit the defendant, and the jury retires, and returns into court and renders a verdict of not guilty, the order directing the jury to acquit will not be disturbed by the appellate court, notwithstanding the trial court is only authorized to "advise" the jury to acquit.

APPEAL from an order of the Superior Court of Sierra County directing the jury to acquit the defendant.

The facts are stated in the opinion of the court.

Attorney-General Marshall, for Appellant.

Van Cleef & Wehe, for Respondent.

McKINSTRY, J.—The information, charging the defendant with an assault with a deadly weapon, is valid and regular in form. To the information the defendant pleaded not guilty.

The issue came on regularly to be tried by a jury, and certain witnesses were called and sworn on behalf of the prosecution, and gave testimony. The court, on motion

of the defendant, instructed the jury to acquit the defendant. Whereupon the jury retired, and returned into court and rendered verdict of "not guilty." The district attorney excepted to the order of the court directing the jury to acquit the defendant.

The people have appealed from the order directing the jury to find for the defendant. (Penal Code, sec. 1238.) Prior to April 9, 1880, section 1238 did not contain the subdivision which purports to authorize such an appeal.

The criminal practice act in force prior to the codes provided for an appeal to the Supreme Court by the party aggrieved, "whether that party be the people or the defendant." (Hittell's Gen. Laws, sec. 481, par. 2068.)

The defendant here has been once in jeopardy, and he has been once acquitted. He cannot be twice put in jeopardy. (Const., art 1, sec. 13.)

If a party is once placed upon his trial before a competent court and jury upon a valid indictment, the "jeopardy" attaches, to which he cannot be again subjected, unless the jury be discharged from rendering a verdict by a legal necessity, or by his consent; or in case a verdict is rendered, if it be set aside at his instance. (*People v. Webb*, 38 Cal. 467.)

The court was only authorized to "advise" the jury to acquit, and the jury were not bound by the advice. (Penal Code, sec. 1118.) Here the bill of exceptions reads that the court "instructed" the jury, but the jury retired and deliberated before rendering the verdict "not guilty." They were permitted to retire for deliberation, and found a verdict. *Non constat* that they did not act on the evidence. The request of the defendant that the court "instruct" should have been denied, but the court was authorized to "advise" an acquittal. It is no reason for setting aside the direction that the defendant *consented* to a verdict in his favor. We cannot here inquire whether the verdict was sustained by the evidence. "If through

misdirection of the judge in matter of law a verdict is improperly rendered, it can never afterward on application of the prosecution in any form of proceeding be set aside." (Bishop, cited by Sawyer, J., in *People v. Webb, supra.*)

"A legislative provision for the rehearing of a criminal cause cannot be interpreted to violate the constitutional rule." (1 Bishop's Crim. Law, 665.)

Order affirmed.

SHARPSTEIN, J., ROSS, J., MYRICK, J., THORNTON, J., MORRISON, C. J., and MCKEE, J., concurred.

[No. 11083. Department One.—June 17, 1886.]

DAWSON LOW, APPELLANT, v. L. M. WARDEN,
RESPONDENT.

PROMISSORY NOTE — ACTION ON — PROOF OF INDORSEMENT — PRACTICE — OPENING CASE AFTER RESTING — NONSUIT. — The action was brought on a promissory note by an indorsee. The complaint alleged the execution of the note, its assignment to the plaintiff by the payee, and that he was the owner and holder thereof. The answer admitted the execution of the note, but denied every other allegation of the complaint. On the trial the plaintiff offered the note in evidence, proved that no part of it had been paid, and rested without any proof of the indorsement. The defendant then moved for a nonsuit on the ground that there was no proof of the indorsement. The plaintiff's counsel contended that no such proof was necessary, but upon an intimation of the court to the contrary, asked leave to open the case and introduce evidence of the indorsement. This the court refused to allow, and granted the motion for nonsuit. The nonsuit, if allowed to stand, would have compelled the plaintiff to bring a new action, to which the statute of limitations would be a bar. Held, that under the circumstances the rulings of the court were erroneous.

APPEAL from a judgment of the Superior Court of San Luis Obispo County, and from an order granting a motion for a nonsuit.

The facts are stated in the opinion of the court.

W. H. Spencer, and Craig & Meredith, for Appellant.

E. & William Graves, and J. N. Turner, for Respondent.

THORNTON, J.—This is an action on a promissory note. The complaint averred the execution of the note, and that it had been sold and assigned to the plaintiff by the payees, "D. Low and Brother," and that plaintiff was the owner and holder thereof.

The defendant by his answer admitted the execution of the note, but denied every other allegation of the complaint.

The plaintiff's counsel proved by oral testimony that on December 10, 1880, defendant was indebted to D. Low and Brother in the sum of \$762 on his promissory note to them; that on that day he paid them \$400, and gave to them a new note for \$362. A copy of this new note, on which this action was brought, is set forth in the complaint. Plaintiff further proved that no part of this note had been paid. He did not then offer the note, which it appears was in his possession. The defendant moved for a nonsuit on the ground that the note on which the suit was brought had not been offered in evidence. Plaintiff was then allowed by the court to offer the note in evidence. When it was offered, the defendant objected to its introduction on the ground, among others, that the note was not properly indorsed. It does not appear that the indorsement was at that time offered,—nor was the attention of the court called to it,—though it subsequently appeared that the note had written on the back of it, "D. Low and Brother." The plaintiff rested without any proof of the indorsement.

The defendant then moved for a nonsuit on the ground that there was no proof of the indorsement of the note. The plaintiff's counsel contended that no such proof was necessary. The court, after hearing argument, intimated that proof of the indorsement was necessary. Upon this,

plaintiff's counsel asked leave to open the case and introduce testimony concerning the indorsement. This the court refused to allow, and granted the motion for a nonsuit, to which rulings plaintiff excepted.

We are of opinion that justice to the plaintiff demanded of the court that he should have been allowed to introduce testimony to prove the indorsement. The views of plaintiff's counsel in regard to the questions presented were novel and peculiar, and the course pursued by him singular, but we do not think that this justified the court in refusing to allow the plaintiff to prove that the note had been indorsed to him. The request was simply to prove the handwriting of the payees of the note. It was not an offer to prove something which rested in parol merely, as to which a wider discretion in granting or refusing it might be conceded to the court below.

If the nonsuit were allowed to stand, the plaintiff would be compelled to bring a new action, to which the statute of limitations would be a bar. The plaintiff would thus suffer the loss of money justly due to him. Under the circumstances, this should not be allowed. We think the court erred in refusing to permit the plaintiff to introduce testimony as to the indorsement, for which the judgment must be reversed.

There is nothing in the other ground on which the motion for a nonsuit was based, viz., that the note was barred by the statute of limitations.

The judgment is reversed, and cause remanded for a new trial.

McKEE, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied.

[No. 9350. Department Two.—June 17, 1886.]

IN THE MATTER OF THE ESTATE OF W. J. TANNER,
AN INSOLVENT.

APPEAL — INSOLVENCY — ORDER SETTLING ACCOUNT — ABSTRACT OF EVIDENCE — RECORD. — On an appeal from an order settling the final account of an assignee in insolvency, a paper embodied in the transcript, certified by the trial judge as containing "an abstract of the evidence given on the hearing of the settlement of the account of the assignee," forms no part of the record, and will be disregarded.

APPEAL from an order of the Superior Court of the city and county of San Francisco settling the final account of an assignee in insolvency.

The facts are stated in the opinion of the court.

Robert Ash, for Appellant.

A. D. Splivalo, for Respondent.

THORNTON, J. — This is an appeal from an order of the Superior Court of the city and county of San Francisco settling the final account of Julius Buhlert, assignee of the estate of the insolvent above named.

There is in the transcript a paper, certified by the judge of the court below as containing "an abstract of the evidence given on the hearing of the settlement of the account of said assignee."

We know of no law authorizing this court to notice the contents of this paper. It must therefore be disregarded.

We find nothing erroneous in the record.

Order affirmed.

McKEE, J., and SHARPSTEIN, J., concurred.

[No. 9368. Department Two.—June 17, 1886.]

HENRY P. IRVING, APPELLANT, *v.* H. W. CARPENTER ET AL., RESPONDENTS.

PRACTICE — DEFENDANT SUED BY FICTITIOUS NAME — SETTING ASIDE SUMMONS — DISMISSAL. — In an action to quiet title to land, when the complaint alleges that the plaintiff is ignorant of the name of a defendant, who is sued and served with summons under a fictitious name, as provided by section 474 of the Code of Civil Procedure, the defendant so sued is not entitled to have the service of summons set aside and the action dismissed upon showing that the plaintiff could have ascertained his real name if he had exercised reasonable diligence in examining the public records of the county.

APPEAL from a judgment of the Superior Court of Alameda County.

The facts are stated in the opinion of the court.

Henry P. Irving, and T. R. Wise, for Appellant.

H. S. Brown, for Respondents.

THORNTON, J.—This is an action to quiet title to land in Alameda County. The complaint contains this averment: "That H. W. Carpentier, J. P. Jones, Charles Crocker, Leland Stanford, and others of whose names plaintiff is ignorant, and whom he designates by the names of Tom Jones, Mary Jones, John Smith, and John Brown, and whose names when discovered he asks leave to insert in an amendment to this complaint, all of whom are in possession of the said land, and claim an interest therein adverse to this plaintiff."

The summons in the action was on the 8th of February, 1883, served on the Pacific Improvement Company, sued as Tom Jones.

On the 14th of February, 1883, the above-named company, by its attorney, H. S. Brown, gave notice to plaintiff that it would move the court on the 19th of February, 1883, to set aside the service of summons, and to dismiss

this action as to the company, on the ground that the plaintiff had notice at the time of the commencement of the action that the company claimed an interest in the premises in controversy adverse to him. The motion was subsequently made, and on the hearing there was filed on behalf of the company an affidavit of Frank S. Douty, its treasurer and assistant secretary, to the effect that plaintiff at the time of the commencement of the action (which was on the ninth day of February, 1882), and ever since the fourth day of February, 1881, had legal notice that this company was one of the parties who claimed an interest in the lands described in plaintiff's complaint in this, that on the fourth day of February, 1881, a deed from Charles Crocker to the company for the undivided two-thirds part of the lands was recorded in the office of the county recorder of the county of Alameda in Liber 214 of Deeds, page 359, as will fully appear by referring to said records, and had plaintiff exercised any care and diligence whatsoever in examining or searching the records of said county, he could and would have seen that the company claimed and held in fee-simple an undivided interest in said lands.

The affidavit of plaintiff was also read on the hearing, in which he stated that at the time of bringing this suit he did not know that the Pacific Improvement Company was the name of the defendant that claimed an interest in the property; that he knew some one did, but did not know the name, and therefore sued by a fictitious name; that in January last (1883) he first learned from Harvey S. Brown, who appeared as counsel in this case, that the Western Development Company was the true name of the defendant; that when he found out from the records what the true name of the defendant was, that was the first time he knew it; that no person was in possession when the action was brought; that the plaintiff knew of that, and that no one was in the open and visible occupation of the land.

The court granted the motion, to which the plaintiff excepted. Judgment of dismissal was accordingly entered, from which this appeal is prosecuted.

By section 474 of the Code of Civil Procedure it is provided that "when the plaintiff is ignorant of the name of a defendant he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly."

In this case the plaintiff did make the averment (it is quoted above) required in the section above referred to.

This averment has never been regarded as traversable. It cannot be done by the answer. Then why should it be permitted to be traversed in any other mode?

Moreover, the affidavit of Douty does not show that plaintiff was ignorant. It shows that if he had examined a book of records named he would have discovered that a certain deed purported to be there recorded. But this does not show that the plaintiff was ignorant of the fact when he commenced his suit. It merely shows that he failed to examine a certain book, which if he had examined would have afforded him some information. His failure to examine tends to establish the fact of ignorance.

Further, the record of the deed mentioned was no notice to the plaintiff. It is only notice to subsequent purchasers and mortgagees (Civ. Code, sec. 1213), and it does not appear that the plaintiff belonged to either of these classes.

We know of no law which makes it the duty of a plaintiff to examine the records of a county recorder's office to find out names of parties defendant, the neglect of which will subject him to have the service of his summons set aside and the cause dismissed as to a person sued by a fictitious name, whose real name he might have found out by examining the record of deeds of the county in which the land embraced in the action is situ-

ated, when he has made the averment in the complaint required by the statute.

The statute above referred to is an enabling one, and should be so construed as to cure the evil it was designed to correct and advance the remedy. Persons are sometimes compelled to bring suits in haste. They have not time to ascertain the true names of parties to be made defendants. The statute of limitations may, in a day from the time the preparation of the complaint is commenced, effect a bar. Sometimes there is no means readily accessible of ascertaining the true names. The statute above referred to was enacted to afford a remedy in such cases. Should a plaintiff lose his right to have his case tried because of ignorance of the names of parties whom he has a right to sue, and as to whom he may have a good cause of action? How is the party sued by a name not his own injured? He loses no right by allowing a plaintiff to proceed as provided by the statute. He has every opportunity accorded to any other defendant to make his defense. He can demur or file his answer, and set up every defense which he is advised he can rely on.

The counsel for respondent herein likens this case to that of a party allowed to bring an action for relief on the ground of fraud, in which case the cause of action is not deemed to have accrued until the discovery by the party aggrieved of the facts constituting the fraud. In construing this rule, it has always been held that a party discovers the fraud when by the use of reasonable diligence he might have ascertained the facts constituting the fraud. But the rule prescribed by the statute in this case is entirely different. It is when he is actually ignorant of a certain fact, not when he might by the use of reasonable diligence have discovered it. Whether his ignorance is from misfortune or negligence, he is alike ignorant, and this is all the statute requires. This is the true meaning of the statute. We adopt it the more

readily because the party thus brought in as a defendant loses no rights by it.

We think for the foregoing reasons, that the judgment is erroneous and should be reversed, and the court below directed to vacate the order setting aside the service of summons.

Rosencrantz v. Rogers, 40 Cal. 489, has no application here. In that case the complaint did not contain the averment as to ignorance required by the statute. The plaintiffs therein did not bring themselves within the provisions of the statute. The defendants appeared on the face of the complaint to be sued by their true names. Further, in that case there was actual and continued occupancy by the persons claiming the land sued for at the time and long before the suit was commenced. Here it is stated in the affidavit of plaintiff, and is not denied, that there was no actual occupation when the action was begun.

It was useless for the plaintiff to offer to amend, as the court below must have ruled that he had not brought himself within the statute.

The judgment is reversed, and the cause remanded, with directions to the court below to vacate the order setting aside service of summons, and to permit the plaintiff to amend his complaint by inserting the name of the Pacific Improvement Company as a party defendant, the company to be allowed ten days to answer after service of notice of the above amendment.

McKEE, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied.

[No. 9444. Department Two.—June 17, 1886.]

A. J. TURNER, APPELLANT, *v.* JOHN STRENZEL
ET AL. JOHN STRENZEL, RESPONDENT.

MECHANIC'S LIEN — MATERIAL-MAN — LIABILITY OF OWNER OF BUILDING. — A material-man who has furnished materials to the original contractor of a building, to be used by him in its construction, is only entitled to be paid therefor by the owner of the building from that portion of the contract price which remains due and unpaid to the contractor by the owner when the lien for the materials was filed.

Id. — ACTION TO ENFORCE LIEN — NECESSARY averments — INSUFFICIENT COMPLAINT. — The complaint in an action to enforce the lien of a material-man is insufficient if it fails to allege that anything was due from the owner to the original contractor when the lien was filed, notwithstanding it alleges that during the construction of the building the owner compelled the contractor to abandon the work, took possession of the building, completed it, used the materials furnished the contractor in its completion, and withholds from the contractor a large portion of the contract price.

APPEAL from a judgment of the Superior Court of Contra Costa County.

The facts are stated in the opinion of the court.

William & George Leviston, and William H. Fifield, for Appellant.

The owner of the building, by preventing performance by the contractors and confiscating the materials furnished them, is liable for the liens of the material-men, and is estopped from saying that no part of the contract price is due and unpaid. (*Preston v. Sonora Lodge*, 39 Cal. 117; *Shaver v. Murdock*, 36 Cal. 293; *Weber v. Weatherby*, 34 Md. 656; *Schwartz v. Saunders*, 46 Ill. 18.)

Daniel Titus, for Respondent.

The complaint was insufficient in that it did not allege that any money was due the original contractor when the lien was filed. (*Dore v. Sellers*, 27 Cal. 593; *Renton v. Conley*, 49 Cal. 187; *Wells v. Cahn*, 51 Cal. 423; *Dingley v. Greene*, 54 Cal. 333; *Rosekranz v. Wagner*, 62

Cal. 151; *Whittier v. Hollister*, 64 Cal. 283; *O'Donnell v. Kramer*, 65 Cal. 353.)

THORNTON, J.—Action by the assignee of material-men to foreclose what is alleged to be a mechanic's lien.

There was a demurrer by defendant Strenzel to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, which was sustained. The plaintiff declined to amend, and judgment was entered against him, from which judgment this appeal is prosecuted.

The complaint states that the defendant Strenzel was the owner of the premises on which he contracted with Sylvester and Langabee to erect a building for the sum of eight thousand two hundred dollars; that the contractors, Sylvester and Langabee, proceeded, under the contract, to erect this building on the premises aforesaid, and so continued until it was in an advanced stage, and they had earned and received two installments of the contract price of fifteen hundred dollars each; that while so engaged, they purchased the material sued for from the assignors of plaintiffs, Turner, Kennedy, & Shaw, to be used in the building; that the building has been completed and a lien filed in time; that the defendant Strenzel, from the commencement of the work, interfered with and impeded the contractors in the performance of the contract, and after they had progressed therein to the extent hereinbefore stated, and while they were faithfully performing the same, and had upon the faith of the contract purchased from various material-men, including Turner, Kennedy, & Shaw, large quantities of various kinds of building materials, to be used in the building, for which they had not and have not paid, defendant Strenzel, without right, and without the knowledge or consent of Turner, Kennedy, & Shaw, compelled the contractors to abandon their work on the building, expelled them from it, refused to allow them to

proceed with said work, took possession of the building, completed it, and used the materials purchased by the contractors in completing it, and has withheld and still withholds from the contractors the balance of the contract price, to wit, the sum of five thousand two hundred dollars or thereabouts.

The other allegations of the complaint are of the assignment of the claim to plaintiff, of subordinate interests of the defendants other than Strenzel, followed by the usual prayer.

A material-man is only entitled to be paid from that portion of the contract price which remains due and unpaid to the contractor by the owner when he (the material-man) files his lien (*Rosekranz v. Wagner*, 62 Cal. 154, and cases there cited), and where the complaint fails to allege that anything is due from the owner to the original contractor when plaintiff's lien was filed, it does not contain a statement of a cause of action. This was so held in the cases above referred to.

There is no averment of the character just above stated in the complaint herein. It nowhere appears that the owner had not paid to the contractors prior to the filing of any lien by plaintiff's assignors all that was due to them.

Conceding that Strenzel by his acts in expelling the contractors and completing the building himself assumed the place of the contractors, stood in their shoes, and should be regarded as doing the work for the contractors, and that the work done by Strenzel on the building cost less than five thousand two hundred dollars, the remainder of the contract price leaving a balance due to the contractors, still, the complaint is not framed in this view. We must assume that the completion of the building cost Strenzel something, but there is no averment of the amount which he had to expend in completing it. It may have cost him more than five thousand two hundred dollars to complete it, (and in such case

there would be no balance which the contractors would have a right to. Strenzel by his acts did not become bound to the material-men, or the plaintiff, their assignee, for the price agreed to be paid by the contractors for the materials purchased. The materials, under the allegations of the complaint, had become the property of the contractors. They were not when Strenzel took possession of them and used them in completing the building the property of either of the material-men or their assignee. Such being the case, we cannot see what right the plaintiff has to recover anything of Strenzel by reason of his having taken, even wrongfully, the materials referred to and used them in completing the building.

It is contended that Strenzel, having wrongfully prevented the contractors from doing the work while they were engaged in doing it, and seizing the materials purchased by them, and using them in finishing the building, is estopped from saying there is no fund, and that his property is not liable. If estopped, how far is he estopped? If there is an estoppel of the character supposed, it would be of no advantage to the plaintiff unless Strenzel was estopped to deny that the fund was not sufficient to pay off the claim of plaintiff. But we perceive nothing like an estoppel. Admitting the facts in the complaint to be true, he has committed a breach of contract, and has wrongfully converted some property of the contractors, for which he is responsible in damages to them, but not to the plaintiff.

The court below committed no error in sustaining the demurrer to the complaint.

As this disposes of the cause, it becomes unnecessary to consider the ruling of the court below in its order directing a certain portion of the complaint to be stricken out.

Judgment affirmed.

McKEE, J., and SHARPSTEIN, J., concurred.

[No. 9374. Department Two.—June 18, 1886.]

BENJAMIN MORGAN, APPELLANT, *v.* MARK L. McDONALD, RESPONDENT.

PRACTICE — AFFIDAVIT OF MERITS — REQUISITS STATEMENTS OF — SETTING ASIDE JUDGMENT BY DEFAULT. — On motion by a defendant to set aside a judgment by default, the affidavit of merits must state that he has fully and fairly stated the facts of the case to his counsel. A statement in the affidavit that he has fully stated the facts of his defense to his counsel is insufficient.

ID. — COURT CANNOT WAIVE PROPER AFFIDAVIT. — On such a motion the court has no authority to waive a proper affidavit of merits.

APPEAL from an order of the Superior Court of the city and county of San Francisco setting aside a judgment.

The facts are stated in the opinion of the court.

Clement, Osment & Clement, for Appellant.

James A. Waymire, for Respondent.

THORNTON, J.—In this case issues were joined by complaint and answer. The cause was on the 15th of August, 1883, regularly called for trial. When so called, no one appeared for the defendant. The counsel for plaintiff proceeded with the trial, and introduced some documentary evidence, and called and examined the plaintiff on his own behalf. The court on the day above named rendered judgment for the plaintiff, which judgment was entered in the same day.

Defendant soon afterward gave notice of motion to set aside the judgment aforesaid as one taken against him by surprise, inadvertence, and excusable neglect. The affidavit of defendant read at the hearing of the motion stated that he did not know the cause had ever been set for trial; that his attorney had never informed him of it.

The defendant also presented at the hearing an affidavit of merits in the following form:—

"I have recently substituted James A. Waymire as my attorney, have stated the facts of my defense fully to him, and am advised by him that I have a good defense on the merits."

Conceding that the showing was otherwise sufficient, the affidavit of merits was not. It was not in accordance with the rule laid down by this court in Bank in *Nicker-son v. California Raisin Co.*, 61 Cal. 268. It was there held that the affidavit must show that the defendant has fully and fairly stated the facts of the case to his counsel. The statement in this case is, that defendant has stated the facts of his defense to his counsel. This was the statement in the case just above cited, where the affidavit was held defective. The rule of court submitted on the hearing of the motion in this case presents the essential requirements of the law in regard to an affidavit of merits. We would suggest that it be followed.

The court erred in setting aside the judgment. The affidavit of merits was insufficient. The court had no authority to waive a proper affidavit. The order must therefore be reversed.

Ordered accordingly.

MCKEE, J., and SHARPSTEIN, J., concurred.

[No. 20118. In Bank. — June 22, 1886.]

THE PEOPLE, RESPONDENT, v. WILLIAM H. BELL,
APPELLANT.

CRIMINAL LAW — APPEAL — TRANSCRIPT MUST SHOW SERVICE OF NOTICE — DISMISSAL. — The transcript on appeal in a criminal case must show that the notice of appeal was served on the attorney of the adverse party; otherwise the appeal will be dismissed.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

Motion to dismiss appeal. The defendant was convicted of the crime of grand larceny. The further facts are stated in the opinion of the court.

Robert Ferral, for Appellant.

Attorney-General Marshall, and *J. N. E. Wilson*, for Respondent.

THE COURT. — The transcript herein does not show that the notice of appeal was served on any one. The law requires that it shall be served on the attorneys of the adverse party (Penal Code, sec. 1240), and the transcript on appeal must show it. (*People v. Phillips*, 45 Cal. 44; *People v. Clark*, 49 Cal. 455.) This not being the case, the appeal cannot be considered.

Appeal dismissed.

[No. 20168. In Bank.—June 22, 1886.]

**THE PEOPLE, RESPONDENT, *v.* A. D. JANUARY,
APPELLANT.**

CRIMINAL LAW — ADMISSION TO BAIL PENDING APPEAL — APPLICATION FOR. — The Supreme Court will not admit a prisoner to bail pending an appeal taken by him from a judgment convicting him of a felony, on an application made to it in the first instance, nor until after the determination upon its merits of an application for bail before the judge who tried the cause.

APPEAL from a judgment of the Superior Court of Sacramento County, from an order denying a motion for an arrest of judgment, and from an order refusing a new trial.

The defendant was convicted of the crime of embezzlement, and pending an appeal taken by him, made this application to be admitted to bail. The further facts are stated in the opinion of the court.

Henry Edgerton, N. Greene Curtis, and J. H. McKune,
for Appellant.

*Attorney-General Marshall, Henry L. Buckley, and John
T. Carey,* for Respondent.

McKINSTRY, J. — This is an application to this court that the defendant be admitted to bail pending an appeal. It does not appear that any like application has been made to the Superior Court or the judge thereof. The power to admit a prisoner to bail pending an appeal taken by him from a judgment of conviction of felony ought not to be exercised by the Supreme Court in the first instance, nor until after the determination upon its merits of an application for bail before the judge who tried the cause. (*People v. Perdue*, 48 Cal. 552.)

Motion denied.

THORNTON, J., MCKEE, J., SHARPSTEIN, J., and MYRICK, J., concurred.

[No. 20179. Department Two.—June 23, 1886.]

**IN THE MATTER OF JOHN BICKERSTAFF, ON HABEAS
CORPUS.**

MUNICIPAL CORPORATIONS — REGULATING SALE OF LIQUORS — LICENSE — CONSTITUTIONAL LAW. — The right to pursue a lawful employment is one of the privileges and immunities guaranteed to a citizen by the constitution of the United States; but such right is not abridged, within the meaning of the fourteenth amendment to the constitution, by a municipal ordinance which merely regulates the sale of liquors and imposes a license thereon without prohibiting their sale.

Id. — CONDITIONS TO ISSUANCE OF LICENSE — REASONABLENESS OF. — An ordinance of the city of Stockton, passed on the 25th of May, 1885, provided that a license to carry on the business of selling liquors could only be obtained by an application to the city council, founded upon the petition of the applicant, accompanied by a certificate of five respectable citizens of the neighborhood in which the business is to be conducted as to his character. The ordinance further provided that upon complying

with this condition the applicant should be entitled to a license if the city council found, from the certificate and the report made to it by the officers to whom the petition had been referred, that he was qualified to carry on the business. *Held*, that the conditions imposed upon the issuance of the license were not unreasonable, and that the ordinance was valid.

APPLICATION for a writ of *habeas corpus*. The facts are stated in the opinion of the court.

Henry I. Kowalsky, and John Gibson, for Petitioner.

F. H. Smith, for Respondent.

McKEE, J.—The petitioner was convicted of keeping a saloon in the city of Stockton without having obtained a license as required by an ordinance passed the 25th of May, 1885.

The ordinance was passed under charter provisions which empowered the municipal legislature, among other things, "to license, regulate, tax . . . all tippling-houses, dram-shops, saloons, bars, bar-rooms, etc., . . . and to fix and collect a license tax upon all occupations and trades, and all and every kind of business, authorized by law, not heretofore specified"; and it proves "that in the business of selling intoxicating drinks, wines, ales, and beers in less quantities than one quart, or to be drank on the premises where sold, and on any other business, trade, or calling not provided by law to be licensed for state and county purposes, the amount of license shall be fixed at the discretion of the city council, as they may deem the interests and good order of the city may require; also to prevent and restrain any riot or riotous assemblage, disturbance of the peace, or disorderly conduct in any place, house, or street in the city."

A grant of power to a legislative body to regulate trades and employment "at its discretion" confers power for that purpose unrestrained and unlimited, except by constitutional or statutory restrictions and limitations; that is to say, where power is given to a municipal legis-

lature to legislate upon a subject, it may be exercised in conformity to fundamental provisions of the constitution and the general laws of the state applicable to the same subject, and with its exercise courts have no power to interfere; but when legislative action results in municipal law, the validity or invalidity of the law is determinable in judicial proceedings in which the question is directly involved.

Here it is contended that the ordinance under which the petitioner has been convicted is unconstitutional and void, because it contravenes in its eighth section that part of the constitution of the United States which declares: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (14th Amend. U. S. Const.)

Section 8 of the ordinance reads thus:—

"Sec. 8. No license shall be issued for any saloon, bar, bar-room, dram-shop, or tippling-house, or any other place where intoxicating drinks, wine, ale, or beer are sold in less quantities than one quart, or to be drank on the premises where sold, except upon the order of the city council of the city of Stockton.

"Whenever any person desires to open, keep, or conduct any of the places enumerated in this section, such person shall petition the city council to order a license issued therefor, and shall present with such petition a certificate signed by five respectable citizens of said city, residing or doing business in the immediate vicinity of such proposed place, setting forth that the applicant is a person of good moral character, and a sober and suitable person to keep and conduct such a place.

"No license shall be ordered issued until the next regular meeting of the council after such petition and

certificate is received. Upon receiving such petition and certificate, the council may refer the same to the mayor, president of the city council, and chief of police for investigation as to the moral character of the applicant, and whether such applicant is a sober and suitable person to keep and conduct such place, and they shall report to the council at the next regular meeting.

"If the council finds such person to be of good moral character, and a sober and suitable person to keep and conduct such place, they shall order the clerk to issue a license. If the council shall find that the applicant is not a person of good moral character, or is not a sober or suitable person to keep and conduct such a place, they shall deny the petition.

"If the petition be denied, no license shall be issued.

"Should the council at any time determine that any person keeping or conducting any such place is not a person of good moral character, or is not a sober or suitable person to keep and conduct such place, they may revoke such order, and thereupon no further license shall issue."

There is no doubt that the right to pursue a lawful employment is one of the privileges and immunities in which the citizen is entitled to be secured and protected under the constitution and laws. Such a right cannot be abridged by municipal legislation; but, like every other right of person or property, its exercise may be regulated by law, and that is evidently the object of the ordinance whose constitutionality is assailed. Regulation with a view of revenue seems to be its scope and subject-matter. It does not prohibit the sale of intoxicants; it contains no provision which abridges the right of any one to engage in the business of selling them; but upon the basis of existence of the right, it provides by section 8 *how* the right shall be exercised.

Under the ordinance, any one who wishes to carry on a business must procure a license for that purpose. The

license is obtainable by an application to the city council, founded upon the petition of the applicant, accompanied by a certificate of five respectable citizens of the neighborhood in which the business is to be conducted as to the character of the applicant. Upon complying with this condition, the applicant is entitled to an order for the issuance of the license for which he has petitioned, if the city council, in the exercise of its jurisdiction, shall find from the certificate and the report made to it by the officers to whom the petition has been referred that he is qualified to carry on the business.

The condition upon which the license is issuable is not unreasonable. There is no force in the objection that by it the council delegates its authority to issue licenses to the five persons who may sign the certificate, or to the municipal officers who are required to investigate and report as to the character of the applicant. The condition relates only to the *mode* of applying for a license, and not to the *power* to issue it. Jurisdiction to issue is put in motion by the petition and certificate; and upon the petition, fortified by the required certificate and report as evidence, the city council acts judicially in making the order. If the applicant be a suitable person to carry on the business for which he asks to be licensed, and his application conforms to the requirements of the ordinance, the council would be bound to grant the license. But the means prescribed for procuring the license constitute the law of the application to exercise the right to carry on the business, and it is necessary to comply with the law in order to enjoy the right, if the law is valid and reasonable.

It was entirely competent for the city council, in passing the ordinance, to annex as a condition to granting a license to carry on business that an applicant for the license shall show himself to be a suitable person to carry on the business, and to provide that it shall be conducted in such a way that the business itself shall not threaten

or become dangerous to the social order of the municipality. To that end, it was also competent for the council to prescribe causes for which the license would be forfeited.

The ordinance is valid, and the conditions prescribed for issuing licenses under it to persons applying for them are not unreasonable. Such conditions have been generally upheld by the courts as proper and reasonable. (*Ex parte Guererro*, 69 Cal. 88; *People v. Meyers*, 95 N. Y. 223; *Metropolitan etc. v. Barric*, 34 N. Y. 657; *Whitten v. Mayor etc.*, 43 Ga. 421; *Muller v. Commissioners*, 89 N. C. 171; *Leighton v. Maury*, 76 Va. 865.)

W:it dismissed.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 11432. Department Two.—June 23, 1886.]

JOHN LATTEMORE, RESPONDENT, *v.* E. J. BALDWIN, APPELLANT.
APPELLANT.

CONTRACT FOR SERVICES — PAYMENT BY THE DAY. — In an action to recover for services alleged to have been rendered for the defendant at an agreed price per day, the plaintiff is only entitled to recover for the length of time during which he was engaged in the services, at the price agreed upon.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Wells, Van Dyke & Lee, for Appellant.

Albert M. Stephens, for Respondent.

McKEE, J.—Appeal from a judgment and order denying a motion for a new trial in an action to recover \$339 for wages, at the rate of one dollar per day, alleged to be

due and owing for services rendered for the defendant in taking charge of a tract of land and keeping a ditch on it in repair from the 21st of April, 1884, until the 1st of April, 1885.

The pleadings were verified. The answer of defendant specifically denied the allegations of the complaint. Upon the trial of the issue raised by the pleadings, a verdict was rendered in favor of the plaintiff for \$337, and it is claimed that the verdict was not sustained by the evidence.

The evidence upon which the verdict was rendered was given by the plaintiff himself, who, on examination as a witness in his own behalf, testified: "Some time in 1884 I was employed by the defendant on a ditch. Baldwin came to me and said: 'I have bought all this land above you from the railroad, and all the settlers are now going off, and I want you to take charge of it and keep the ditch in repair, and keep any one from settling on the land'; and said he would give me a dollar a day; . . . and I said I would do that, and worked from that time, the 21st of April, 1884, until the 12th of July, 1884, under and pursuant to said contract, and I have never been paid, nor have I ever received anything for said work."

This evidence proves that the plaintiff rendered services under the agreement stated in his complaint for only about eighty days, Sundays included, and according to his own proofs, he was not entitled to recover for more than that time, at the price per day for which he agreed to render the services. The verdict of \$337 was therefore not sustained by the evidence, and the court erred in not granting a new trial.

Judgment and order reversed, and cause remanded for a new trial.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 9926. In Bank.—June 23, 1886.]

SAMUEL GATES, RESPONDENT, *v.* S. M. McLEAN,
APPELLANT.

APPEAL — ERRONEOUS FINDING — IMMATERIAL ERROR — JUDGMENT — NEW TRIAL. — Where an appeal from the judgment and an appeal from an order refusing a new trial are contained in the same transcript, the judgment will not be reversed or a new trial granted because of the failure of the court to find on a particular issue in favor of the appellant, or because a certain finding was without the issues, if the correction of the findings would not change the result.

CONTRACT FOR SALE OF LAND — INSUFFICIENT ATTACHMENT NOT AN ENCUMBRANCE. — An attachment purporting to have been levied on certain land, but which was not served or levied as required by law, or in such a manner as to constitute a lien thereon, is not an encumbrance within the meaning of an agreement to sell the land free from all encumbrances.

ID. — VENDEE WHEN NOT ENTITLED TO POSSESSION — IMPLIED LICENSE TO ENTER. — Under a contract for the sale of land, which does not provide for the purchaser entering into possession, no license to enter is implied.

ID. — FAILURE OF TITLE OF VENDOR — RESCISSION BY VENDEE — LIABILITY FOR PURCHASE PRICE. — Where the contract provides for the vendee taking possession, his remedy, in case the title of the vendor fails, or he is unable to make a conveyance as stipulated in the contract, is to rescind or offer to rescind the contract, and to restore the possession, in which event he may recover the purchase-money advanced, with interest thereon, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably be worth. If, on the contrary, the vendee chooses not to rescind, but to retain possession under the contract, he can do so only on condition that he pay the purchase-money and interest according to the contract. In the latter case, it is considered that he is willing to receive such title as the vendor is able to give, and is content with the personal responsibility of the vendor upon his covenants.

APPEAL from a judgment of the Superior Court of Stanislaus County, and from an order refusing a new trial.

The action was brought to recover the possession of certain land, which the plaintiff had contracted to sell to the defendant. Judgment was rendered in favor of the plaintiff. The further facts are stated in the opinion of the court.

Wright & Hazen, W. L. Dudley, William O. Minor, and L. J. Maddux, for Appellant.

W. E. Turner, for Respondent.

McKINSTRY, J.—The contract between the parties, as alleged in the complaint, was: “On the eighth day of October, 1881, this plaintiff agreed to and with said defendant to sell and convey said lots and parcels of land [hereinafter described] to said defendant; for the agreed price of two thousand eight hundred dollars; that on said date the said defendant paid to plaintiff the sum of three hundred dollars, and then and there promised and agreed to and with the plaintiff to pay the balance of said purchase-money, to wit, the sum of two thousand five hundred dollars, and interest thereon at one per cent per month from said eighth day of October, 1881, on the execution and delivery by plaintiff to said defendant of a good and sufficient deed of conveyance of and to said lots and parcels of land.”

As alleged in the answer, the contract was: “On the 8th of October, 1881, plaintiff and defendant entered into an agreement for the sale and conveyance to defendant by plaintiff of the lots described in the complaint [the same hereinafter described] in consideration of two thousand eight hundred dollars to be paid to the plaintiff by defendant upon plaintiff making and executing and delivering to defendant a good and sufficient *title* to the lots described in the complaint, free from all encumbrance save and except the present tax liens.”

The Superior Court found: “On the eighth day of October, 1881, a contract of sale between the parties was finally culminated, made and entered into, and the following terms were then and there agreed to by and between said parties, to wit: that the said defendant should pay to the plaintiff as the purchase price for said lots the sum of two thousand eight hundred dollars in the

manner following: three hundred dollars in cash within a reasonable time after said eighth day of October, 1881. But out of said two thousand five hundred dollars defendant was to assume and pay the mortgage lien then on said premises in favor of one McLellan, and which at that time amounted to about twelve hundred dollars. It was also agreed by and between said parties to said contract that in case the deed, then on file, from said Fulkerth to said James Brusie, purporting to convey from said Fulkerth to said Brusie the title to said lots, should be held to be a good and sufficient deed, sufficient to convey a good and sufficient title to said lots to the said Brusie, paramount to plaintiff's title, then and in that event defendant was to quit and surrender possession of said lots to plaintiff, without damage and without further or other consideration save and except the return by plaintiff of the whole amount of the purchase-money and interest paid to plaintiff by defendant, and upon the return to defendant of said sum aforesaid, said contract was to become from thenceforth void and of no effect."

The contract between these parties was reduced to writing, and is as follows:—

"Received of S. M. McLean the sum of three hundred dollars, part payment of the purchase price of lots Nos. twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), in block No. sixty-eight (68), in the town of Modesto, county of Stanislaus; and I hereby agree to make to the said McLean a good and sufficient title to the above lots, free from all encumbrances, save and except the present tax liens, upon the payment of the further sum of two thousand five hundred dollars, with one per cent. per month interest from date until paid.

"Dated Modesto, October 8, 1881.

(Signed)

"SAMUEL GATES."

The foregoing was given in evidence by the defendant without objection. It is admitted that defendant paid to the plaintiff three hundred dollars (part of the two

thousand eight hundred dollars) when the receipt or writing was executed. The contract as alleged in the pleadings of the respective parties does not differ in its legal effect, except as to interest, and that as alleged in the answer, it contained the clause, "free from all encumbrance save and except the present tax lien." The effect of the promise (averred in the complaint to be in the contract) that plaintiff should execute and deliver "a good and sufficient conveyance" was the same as a promise that he should convey the title. (*Haynes v. White*, 55 Cal. 40.) The contract as proved was substantially the contract alleged in the answer. It varied from that alleged in the answer in that it provided for interest upon two thousand five hundred dollars, but as we have seen, it was introduced by defendant without objection on the part of the plaintiff.

The defendant was entitled to a finding that the contract was as set forth in the receipt above recited.

There is an appeal from the judgment. It is not necessary to say whether, if the case were here upon the pleadings, findings, and judgment alone, we should be compelled to reverse the judgment because the finding is without the issue. But there is an appeal from the order denying a new trial. The two appeals being in the same transcript, we ought not to reverse the judgment if convinced the new trial was properly denied. The defendants did not ask for a new trial on the ground of insufficiency of the findings.

There is a specification in the statement for new trial that finding No. 11, with respect to the terms of the contract, is not justified by the evidence. The specification proceeds: "The contract between the parties is set out in defendant's Exhibit B [being the receipt hereinbefore mentioned], and fails to state anything about a mortgage or a deed to Brusie, but requires plaintiff to make defendant a good and sufficient title, free from all encumbrances, except existing tax liens."

If the finding of the court be disregarded, still the defendant should not have a new trial, if, conceding that the contract was as alleged by the defendant, or as by him proved, the result must be a judgment against him. It has been repeatedly held, that even when the court has omitted to find upon a material issue, a new trial may be denied if on the evidence the finding must have been adverse to the party asking the new trial. By parity of reason, a new trial may be denied if a finding in favor of the party asking the new trial (upon a particular issue) could not have changed the result.

Conceding that the contract ought to have been found as alleged and proved by the defendant, and assuming that what ought to have been found is to be treated as found, what were the rights of these parties?

On October 2, 1878, in the Justice's Court of Empire township, one James Brusie commenced an action to recover of one Minor Walden \$166 and costs, and on said day caused a writ of attachment to be duly issued in the action, which attachment was placed in the hands of W. G. Ross, constable, who on the same day attempted to levy the same on the premises herein demanded. On the 12th of October, 1878, judgment by default was entered in the action in favor of the plaintiff for the amount claimed therein.

The plaintiff herein became the legal owner of the lands in controversy on the 20th of November, 1879, by virtue of a conveyance from Minor Walden (defendant in the justice's suit), which conveyance was duly recorded January 6, 1880.

An abstract of the judgment in the action of *Brusie v. Walden* was filed with the county recorder October 1, 1880.

On the same day a writ of execution was issued on the judgment, under which and the judgment all the right, title and interest of Walden in the lands and premises herein demanded were sold and conveyed by the sheriff to said Brusie.

We agree with counsel for defendant herein that the attachment issued in *Brusie v. Walden* was never served or levied as required by law, or in such manner as to constitute a lien on Walden's title to the lands.

The sheriff's deed therefore only conveyed to Brusie such title as Walden had when the abstract of the judgment in *Brusie v. Walden* was filed with the county recorder. As we have seen, Walden had previously conveyed all his title to the present plaintiff. The attachment did not constitute a "cloud" on the title which the plaintiff herein offered to convey to the defendant. Moreover, if it could be treated as in any sense a cloud, it was not an "encumbrance" within the meaning of the agreement of October 8, 1881.

It follows that if it be admitted that the court below erred in receiving in evidence the record of the action brought by Brusie, in which the nonsuit was granted, the defendant was not injured, because he himself proved the Brusie title to be invalid, and that it constituted no encumbrance. The deed tendered by the plaintiff would have conveyed "a good and sufficient title."

As to the McLean mortgage: On the third day of January, 1880, the plaintiff mortgaged the premises herein demanded to one E. J. McLellan to secure the payment of \$1,195, which said mortgage was recorded, and remained in full force and effect until April 11, 1883, when it was fully paid off, satisfied, and discharged by the plaintiff.

This action was commenced October 30, 1883.

January 9, 1883, plaintiff tendered to defendant, at the town of Modesto, "a grant, bargain, and sale deed conveyance of said lots, which said deed was duly executed and acknowledged by said plaintiff, so as to entitle it to be recorded, and which conveyed the title to said property from said plaintiff to said defendant, his heirs, executors, and assigns, forever, and which contained all the

usual recitals of a grant, bargain, and sale deed, and then and there demanded of and from defendant that he, defendant, should accept said deed, and pay to plaintiff the balance of the purchase price due on said lots, as agreed upon at the time of making said contract "of purchase and sale; but to pay the same or any part thereof, said defendant then and there refused and neglected, and ever since has refused and neglected, and then and there refused to accept said deed.

January 12, 1883, plaintiff again tendered the said deed, together with a certain bond of indemnity, the contents whereof need not be specified.

On the 13th of January, 1883, plaintiff served on defendant a written notice rescinding the contract of sale and purchase of said lots, and all of them, entered into as aforesaid, and the whole and every part of said contract, and at the same time did tender to the defendant the sum of three hundred dollars (the sum paid by defendant to plaintiff when the contract was entered into), and interest thereon at one per cent per month from October 8, 1881, to the said 13th of January, 1883, in all \$342, etc.; and the said plaintiff then and there demanded possession of said lots, and the said defendant refused to deliver possession, etc., but retained and kept possession, and ever since and still holds possession, etc.

When the deed and money were tendered, notice given, and demand made, the mortgage to McLellan was a valid lien on the demanded premises. The mortgage was satisfied before this action was commenced.

The existence of the McLellan mortgage when the deed was tendered is not pleaded in the answer as a defect in the plaintiff's title or as an encumbrance thereon. In his answer, the defendant relies entirely on the Brusie title, so called. When the written contract of October 8, 1881, was signed and delivered, the existence of the McLellan mortgage was known to the defendant, and the court finds that the defendant was to discharge it out of

the deferred payment. But conceding, as claimed by defendant, that all previous conversations were merged in the writing of October 8, 1881, the fact that the McLellan mortgage was unsatisfied was not mentioned by defendant as an objection to the title when plaintiff tendered his conveyance. In response to the tender of the deed, the defendant in writing specified as his objection to plaintiff's title the Brusie suit, attachment, judgment, execution, and deed. If the purchaser is not content to take the title offered, "he should specify his objection and give up possession of the land." (*Viele v. Troy & B. R. Co.*, 20 N. Y. 187.)

The written contract on which the defendant relies does not provide for vendee taking possession, or recognize his right to the possession, as in *Willis v. Wozencraft*, 22 Cal. 607.

In *Spencer v. Tobey*, 22 Barb. 269, it is said: "The plaintiff having given the defendant the possession, if he was not entitled to it under the contract, does not affect the plaintiff's right to recover. Nor can that act, subsequent to the contract, aid in the construction of the contract." And in that case it was held that where the contract does not provide for the purchaser entering into possession, no license to enter is to be implied. In *Gaven v. Hagen*, 15 Cal. 211, the Supreme Court of this state said that *Spencer v. Tobey*, *supra*, correctly lays down the general proposition as to implied license (to enter) arising from a mere contract of purchase.

In *Bohall v. Diller*, 41 Cal. 533, the vendor sought to recover all the money due under the contract, and the possession of the land. Moreover, that case holds that the vendor may rescind on return of the purchase-money received, and recover possession,— the vendee having failed to perform.

In *C. P. R. R. Co. v. Mudd*, 59 Cal. 585, there was a distinct stipulation that on failure of the vendee to pay the vendor should have a right to re-enter. *Hicks v. Lov-*

ell, 64 Cal. 14, and *Whittier v. Stege*, 61 Cal. 238, hold that the vendor can recover in ejectment against the vendee who refuses to perform his contract.

Here the defendant in possession claims the right to retain his possession by virtue of the contract, and yet refuses to pay the purchase price. The plaintiff has tendered a return of the sum paid, and given notice of rescission.

Even where the contract provides for the vendee taking possession, the remedy of the purchaser, where the title of the vendor fails, or he is unable to make conveyance as stipulated in the contract, is to rescind the contract, or offer to, and to restore the possession, in which case he may recover the purchase-money advanced and the interest, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably have been worth. If, on the other hand, the purchaser chooses not to rescind, but to retain possession under the contract, he can do so only on the condition that he pays the purchase-money and interest according to the contract. In the latter case, it is considered that he is willing to receive such title as the vendor is able to give, and is content with the personal responsibility of the vendor upon his covenants. (*Taft v. Kessel*, 16 Wis. 273, and cases cited; *McIndoe v. Morman*, 26 Wis. 588.)

In one of the Wisconsin cases it is said that where the purchaser seeks to rescind, the court may provide by the judgment that the possession be retained until the amount received by the vendor and the value of improvements, less, etc., shall have been paid. If the defendant was entitled to be so protected, his rights were secured by the judgment in the present case. As a set-off to the mesne profits proved, the court below allowed the three hundred dollars paid to the plaintiff October 8, 1881, with interest thereon, to the rescission by plaintiff, and

the value of the improvements on the lands made by defendant while in possession.

Here the defendant, if he proposed to affirm the contract, was required at least to tender the money due on it, less sufficient to discharge the McLellan mortgage. (*Pierce v. Tuttle*, 53 Barb. 155.) Both parties to the contract were to be actors. The defendant could not remain passive and in possession until the plaintiff had performed his contract to the letter. (*Pierce v. Tuttle, supra.*)

Judgment and order affirmed.

THORNTON, J., MYRICK, J., MCKEE, J., and SHARPESTEIN, J., concurred.

[No. 20205. In Bank.—June 24, 1886.]

EX PARTE RICHMOND STICE, ON HABEAS CORPUS.

CONTEMPT — WITNESS — REFUSAL TO BE SWORN — PRIVILEGE. — The refusal of a person called as a witness to comply with an order of the court directing him to be sworn in a case on trial is a contempt of court, and is not excused by the assertion of the witness as a reason for his refusal that his testimony would have a tendency to subject him to punishment for a felony. His privilege cannot be urged by the witness until a question is put to him after being sworn, the answer to which would have that tendency. Whether the answer would or might be of such a tendency is to be determined by the court, and it cannot be called upon to do so in advance of the question being put.

ID. — DEFENDANT IN DIFFERENT INFORMATION MAY BE CALLED. — A party proceeded against in one information for an alleged murder may be called as a witness on behalf of the state to testify against a defendant charged in another and different information with the same killing. In such a case, the party called as a witness retains the right to object to answering a question which would tend to criminate him.

ID. — SEPARATE REFUSALS TO BE SWORN — DISTINCT CONTEMPTS. — The petitioner was called as a witness on the trial of a criminal prosecution, and refused to be sworn. For this he was adjudged guilty of contempt of court, and punished by imprisonment for one day. Upon the expiration of such imprisonment, he was again called as a witness in the same case, and again refused to be sworn. The court thereupon adjudged him guilty of contempt, and sentenced him to pay a fine, or in default thereof, to be im-

prisoned. *Held*, that each refusal to be sworn was a separate contempt, for which the court had jurisdiction to impose separate punishments.

APPLICATION for a writ of *habeas corpus*. The facts are stated in the opinion of the court.

D. M. Delmas, N. C. Briggs, and B. B. McCraskey, for Petitioner.

N. A. Hawkins, for Respondent.

THORNTON, J.—Petition by Stice for discharge on writ of *habeas corpus*.

The return shows that the petitioner, Stice, is in the custody of the sheriff of San Benito County by virtue of a commitment of the Superior Court of that county, of which the following is a copy:—

“In the Superior Court of San Benito County. State of California v. J. F. Prewett.

“On this first day of March, 1886, at the hour of two o'clock, P. M., the above-named cause was upon trial in the above-entitled court, and Richmond Stice was called as a witness for the people, and was ordered by the said court to be sworn as a witness, and thereupon, in the immediate view and presence of the said court, he did refuse to be so sworn as a witness.

“Whereupon it is adjudged that said Richmond Stice is guilty of a contempt of court in refusing to be so sworn as a witness, and as a penalty thereof, it is ordered, adjudged, and decreed that Richmond Stice pay a fine of five hundred dollars (\$500), and that in default of the payment thereof, he be imprisoned in the county jail of San Benito County until said fine be fully satisfied, in the proportion of one day's imprisonment for every dollar of the fine; and on the payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed, that the defendant be discharged from custody.

“JAMES F. BREEN, Superior Judge.”

That a failure to be sworn as a witness in a cause on trial is a contempt of court, we have no doubt. It is so declared by statute (Code Civ. Proc., sec. 1209, subd. 10) and is so at common law.

The court also ordered the petitioner to be sworn as a witness in the cause then on trial, which order he declined to obey. The court had power by law to make such order; a refusal to obey it was also a contempt.

The court adjudged that petitioner was guilty of contempt in refusing to be sworn, and on such adjudication imposed a punishment within the statute. The court had full power to adjudge the contempt and affix the penalty therefor. (Code Civ. Proc., sec. 1209.)

It is no answer to a refusal to be sworn that the petitioner asserted at the time as a reason for such refusal that his testimony would have a tendency to subject him to punishment for a felony. Such privilege cannot be urged by the witness until a question is put to him after being sworn, the answer to which would have the tendency stated above. Whether the answer to such question would be or might be of such tendency, the court in which the trial is proceeding must adjudge (Wharton's Crim. Ev., 9th ed., sec. 469), and it cannot be called on to do so in advance of the question being put. To hold that the reason stated above would justify a person called in refusing to be sworn would be to make such person, and not the court, the final judge, and exclude the court from any consideration of the matter whatever. Such is not and cannot be the law. On the question presented to the court, the reason urged by the petitioner called for no consideration, for the right claimed by petitioner remained to him after he was sworn. He was deprived of no such right by taking the oath as a witness. Under such circumstances, the jurisdiction of the court to adjudge a party guilty of and punish for a contempt was in no wise affected.

But it is said the petitioner was charged by informa-

tion in the same court with the same murder for which Prewett was then on trial; that the information was then pending untried against him; and that he was in fact a co-defendant with Prewett, the party on trial in said charge; that by reason of the foregoing, petitioner was incompetent, and could not be called as a witness, and there was no law empowering the court to order him to be sworn.

Let it be conceded for argument's sake that if the petitioner was incompetent to testify he had a right to refuse to be sworn, and that the court could not make a lawful rule that he be sworn.

It was admitted on the hearing that petitioner was not a defendant in the same information with Prewett, but charged in another and distinct one.

By section 1321, Penal Code, it is provided that "the rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this code."

The rules for determining the competency of witnesses in civil actions are prescribed by sections 1879, 1880, and 1881 of the Code of Civil Procedure. We find nothing in these sections making a party to an action, whether civil or criminal, incompetent as a witness. On the contrary, it is expressly declared that they are not excluded or rendered incompetent, except in the special case mentioned in the third subdivision of section 1881, and that special case does not embrace the cause before us. In the Penal Code there are some express prohibitions in sections 1322 and 1323. Neither of these sections has any application to the case. The first (section 1322) relates to husband and wife, where both are parties to a criminal action or proceeding, and the second (section 1323) relates to a defendant in a criminal action or proceeding, and forbids his being compelled to be a witness against himself. It is manifest that the case before us is not embraced within the two sections just mentioned.

But it is insisted there are certain implied prohibitions in sections 1099 and 1100 of the Penal Code which rendered the petitioner incompetent. Those sections are as follows:—

“ Sec. 1099. When two or more persons are included in the same charge, the court may, at any time before the defendants have gone into their defense, on the application of the district attorney, direct any defendant to be discharged, that he may be a witness for the people.

“ Sec. 1100. When two or more persons are included in the same indictment or information, and the court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must order him to be discharged before the evidence is closed, that he may be a witness for his co-defendant.”

To understand these two sections, the next succeeding section must be considered, which provides that “the order mentioned in the last two sections is an acquittal of the defendant discharged, and is a bar to another prosecution for the same offense.”

We find no provision in sections 1099 and 1100 changing the provisions of the Code of Civil Procedure, above referred to, as to the competency of witnesses, or prohibiting a party not included in the same indictment or information from being called as a witness by either party to it. By the operation of section 1101, the defendant, when discharged under sections 1099 and 1100, is acquitted of the offense stated in the indictment or information; and when he is called as a witness after such discharge, he cannot be allowed to say that anything he may state in his testimony will tend to convict him as regards the offense of which he stands acquitted. He will under such circumstances be more at liberty in answering the questions put to him, and will not be hampered by any apprehension of saying anything which may be used against him. He will, as regards

the offense about which he is called to testify, feel no restraint whatever from fear of convicting himself. For this object, the sections under consideration were enacted. They are enabling in their character. But they do not prohibit the district attorney representing the state from calling a party proceeded against in one information to testify against a defendant charged in another and different information,— the defendant when so called as a witness retaining his right to object to answering a question put to him by reason of its tendency to criminate him.

It would seem that the district attorney would have the same right when two or more defendants are charged in the same indictment or information, and neither elects to be tried separately. But this need not be decided, as Stice is not such a defendant. As stated above, he is charged in an information other and distinct from that in which Prewett was on trial.

We construe the words "when two or more persons are included in the same charge," in section 1099, as meaning the same as the words "when two or more persons are included in the same indictment or information," in section 1100. That this is so is manifest from the words which follow the above, quoted from section 1099.

We cannot admit the correctness of the contention urged by the learned counsel for petitioner, that the words just above quoted from section 1099 mean parties proceeded against for the same offense, though in different informations or indictments. If such contention be allowed, no meaning would be attributed to the words of the section following those above given, viz., "the court may, at any time before the defendants have gone into their defense, on the application of the district attorney, direct any defendant to be discharged, that he may be a witness for the people." We are of opinion that the words "any defendant" refer to a defendant included in the information or indictment on which the trial is proceeding,

and not to a defendant charged in another and distinct information or indictment.

We are of opinion that the witness was competent; that he had no right to refuse to be sworn; that the order of the court that he be sworn was a lawful one, for the disobedience of which he was guilty of contempt, to punish which the Superior Court had jurisdiction.

But it is said the court had no jurisdiction to make the order of the 1st of March, 1886, under which the commitment was had, by reason of what follows.

On the 27th of February, 1886, while the same trial (that of Prewett) was proceeding, in which the order of March 1, 1886, above stated, was made, Stice was called as a witness, and was ordered by the court to be sworn as a witness, and he refused, whereupon he was by the court adjudged guilty of contempt of court. Thereupon the following order was made:—

[Title of court and cause.]

"On this twenty-seventh day of February, 1886, the above-named case was on trial before a jury in the above-entitled court, and Richmond Stice was called in said cause as a witness, and he was ordered by the court to be sworn as a witness, and he refused to be so sworn, whereupon he was by the court adjudged guilty of contempt of court:

"Now, therefore, it is ordered, adjudged, and decreed that said Richmond Stice be and he is hereby committed to the county jail of San Benito County, to be there confined and detained until Monday, the first day of March, 1886, at 10 o'clock, A. M.

"JAMES F. BREEN, Superior Judge."

Under this order Stice was taken into custody by the sheriff, and so held until 10 o'clock, A. M., on Monday, the first day of March. On the 1st of March, 1886, after 2 o'clock, P. M., the order on which the imprisonment is had, from which the petitioner here seeks to be discharged, was made. (See order quoted above.)

Now, it is contended that the refusal to be sworn in the same case is but one offense; that Stice had refused to be sworn on the 29th of February, 1886, for which he had been punished under the order of that date; that when he refused to be sworn on the 1st of March he was guilty of the same offense, and no other, for which he had been punished by the order of the 27th of February; that the penalty inflicted by the order last in date is an additional punishment for one and the same offense, which the court was without jurisdiction to impose.

We do not think that the refusal to be sworn on the 1st of March was the same offense for which the petitioner had already been punished. On the contrary, we think it was a different one.

The petitioner was again called as a witness on the 1st of March. This the district attorney had a right to do. When Stice refused then to be sworn, the court had full power to order him to be sworn, and his refusal to obey such order was a contempt of court, for which the Superior Court of San Benito County had jurisdiction to punish him.

It is argued that if the law be such as is here held, there will be no limit to the making of such orders; that a party may be called as a witness every day or very hour in the day during a protracted trial, and on each refusal to be sworn a penalty might be inflicted, to the great oppression of the subject of it. Such a course would be a great and unjustifiable abuse of power. There is no such case before us. Nor do we anticipate that such an extreme course will be pursued by any court.

In this case the court ruled within its jurisdiction. The petitioner must be remanded to the custody of the sheriff.

So ordered.

MCKINSTRY, J., MYRICK, J., MCKEE, J., and SHARSTEIN, J., concurred.

[No. 9619. In Bank.—June 25, 1886.]

THE PEOPLE, APPELLANT, *v.* JOHN J. COLE, RESPONDENT.

LICENSE — BOARD OF SUPERVISORS — PASSAGE OF ORDINANCE. — Under section 4045 of the Political Code, an ordinance of a board of supervisors fixing the rates of county licenses is not invalid because not passed on the first Monday of October, if the matter of fixing the rates of licenses was considered by the board on that day, and continued from day to day, and the ordinance was finally passed as soon as possible thereafter.

ID. — RECORDING ORDINANCE. — The county-government act of March 14, 1883, does not require that the ordinance shall be recorded before it goes into effect.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order refusing a new trial.

The action was brought to recover the amount alleged to be due for a license tax to sell and dispose of spirituous liquors and wines in less quantities than one quart at a fixed place of business in the county of Fresno. The action was commenced on the 26th of January, 1884. The complaint alleged the previous sale of liquors by the defendant in violation of the ordinance. On the trial, the plaintiff offered in evidence the ordinance-book of the board of supervisors, from which it appeared that the ordinance in question was not recorded until the 1st of February, 1884. The court excluded the evidence, and rendered judgment for the defendant. The further facts are stated in the opinion of the court.

E. D. Edwards, and Sayle & Harris, for Appellant.

Bennett & Wigginton, for Respondent.

MYRICK, J.—Action to recover a license tax of one hundred dollars. The court below granted a nonsuit, and on this appeal two points are presented by the respondent as to the correctness of the ruling:—

1. The ordinance was not passed on the first Monday of October, as required by section 4045, subdivision 3, of the Political Code.

2. The ordinance was not recorded by the clerk in the ordinance-book until after the defendant made the sales complained of. (Act to establish a uniform system of county governments, approved March 14, 1883, secs. 2, 21.)

It appears from the transcript that, on Monday, October 1st, the matter of fixing rates for county licenses came on for consideration by the board of supervisors, and the board, by entry in its minutes, continued the matter until the third; on the third the matter was continued until the fourth; and on the fourth was again continued until the fifth; on the fifth, the ordinance was passed by unanimous vote. We think this was a substantial compliance with the statute. We do not think a proper construction of the language of the statute is that all power over the subject is to cease with the end of the first Monday. We think rather, a proper construction is, that the board should on that day take up the subject for consideration, and conclude it as soon as may be.

As said above, the ordinance was passed October 5th, and was duly signed and published as required by law, but was not recorded until about the 1st of February following. The sales complained of took place between the publication and the recording. It is claimed by the defendant, and the court below seems to have been of that opinion, that the document was not an ordinance until recorded. We do not read in the statute a requirement that the ordinance shall be recorded before it shall take effect; by the statute, publication or posting is made necessary before it takes effect (section 26, act above referred to), but not recording.

The judgment and order are reversed, and the cause is remanded for a new trial.

ROSS, J., SHARPSTEIN, J., THORNTON, J., and MCKINSTTRY, J., concurred.

[No. 20124. In Bank.—June 25, 1886.]

THE PEOPLE, RESPONDENT, v. H. C. PHILLIPS, APPELLANT.

CRIMINAL LAW — FORGERY — INSTRUCTIONS. — In a prosecution for uttering and passing a forged promissory note, certain instructions quoted in the opinion, *held*, not misleading or calculated to confuse the jury.

ID. — VARIANCE BETWEEN INSTRUMENT AS RECITED AND PROVED. — In such a prosecution, where the information purports to set forth the instrument alleged to have been forged *in hac verba*, and a word found in the instrument proved is omitted from the instrument as recited, or a word inserted in the instrument as recited is not in the instrument proved, the variance is immaterial if the change in no manner or for any purpose alters the signification.

ID. — IMMATERIAL VARIANCE. — The information alleged the forgery of a promissory note, described as payable "to H. C. Phillips, or order." The note given in evidence did not contain the word "to" immediately before the words "H. C. Phillips, or order." *Held*, that the variance was immaterial.

ID. — EVIDENCE OF SUBSEQUENT TRANSACTIONS — INTENT. — Evidence of transactions had between the defendant and the person alleged to have been defrauded, after the delivery of the note, is admissible, if it tends to show that the note was used with a fraudulent intent, and to secure a valuable benefit from the person to whom it was delivered.

ID. — INSTRUCTION — ASSUMPTION OF FACT. — An instruction which assumes a fact as proved will not warrant a reversal if the fact is admitted or there is no shadow of conflict of evidence with respect to it.

ID. — IMPEACHED WITNESS — DISREGARDING TESTIMONY. — The evidence of a witness who has been impeached may be disregarded by the jury, and the court may so instruct.

APPEAL from a judgment of the Superior Court of Napa County, and from an order refusing a new trial.

The defendant was convicted of forgery, in uttering and passing to W. A. Elgin a certain promissory note as a true and genuine note of one C. H. Fitch, with intent to defraud Elgin, defendant knowing the note to be forged. The evidence showed that the defendant was indebted to one Liddell in the sum of \$55.50, for which he gave his check on the Nevada Bank. Liddell indorsed the check to Elgin, and sent it to him for collection. Elgin, having discovered that the defendant had no

money in the bank, went to him and demanded what he intended to do about it. The defendant then told Elgin to hold the check, that he had a note and mortgage on which he thought he could raise the money. The same day the defendant gave the note alleged to have been forged to Elgin, and a mortgage, each of which purported to be signed by C. H. Fitch. The mortgage was intended to secure the note, and each were in favor of the defendant. On the following day Elgin hired a team, drove the defendant to Napa City, and there the defendant had the mortgage recorded, Elgin paying for the expenses of the team and the cost of the recording. The defendant thereupon executed an assignment of the mortgage to Elgin for the nominal sum of \$73.40, which included the Liddell check, the team hire, fee for recording mortgage, fee for drawing assignment, and probable fee for recording the assignment. The further facts are stated in the opinion of the court.

Coghlan & Coombs, for Appellant.

Attorney-General Marshall, for Respondent.

McKINSTRY, J.—The court below charged the jury as follows:—

“The defendant is not charged in the information with the forgery of the mortgage. That has been introduced in evidence here for the purpose of showing the intent; showing the intent that the party had in forging (if you find that he did forge), and in passing this promissory note; showing the intent of the passing or the attempt to pass to Elgin for the purpose of prejudicing, damaging, or defrauding him. He is not charged here, I say, with the forgery of that mortgage, and if you find that he did so, still you do not pass upon it in this case as to the question of his guilt or innocence under the information.”

And elsewhere in the charge the court said: " You [the jury] being satisfied that the defendant did voluntarily forge this note; that he, knowing it to be such, passed it to Mr. Elgin, with the intent to injure or defraud Mr. Elgin," etc. And in still another place the court said: " As I stated before, gentlemen, your first point is, Was this note forged by the defendant? Did he know it was forged? Did he pass it or attempt to pass it to W. A. Elgin, to the injury of Elgin?"

It is insisted by appellant that the foregoing was misleading, and calculated to confuse the jury with respect to the offense charged, and comes within the rule laid down in *People v. Monahan*, 59 Cal. 389. There is no doubt that the instructions given in *People v. Monahan, supra*, were confused and misleading.

But by section 470 of the Penal Code, the uttering or passing of a forged promissory note as true and genuine, knowing the same to be forged, is declared to be a forgery. In the last two of the citations from the charge above set forth, the "forgery" spoken of is clearly shown by the context to mean the passing of a note knowing it to be forged. The information charges "forgery, committed as follows," and then proceeds to aver that the defendant did "feloniously, etc., utter, publish, pass, etc., a certain false and forged promissory note," etc. The crime was forgery as alleged, and the question properly put to the jury was, Did the defendant commit that crime as averred in the information? Upon like reasoning, the instruction first above recited was not fatally erroneous.

The appellant urges that his objection to the promissory note given in evidence should have been sustained.

The promissory note alleged to be forged is set out in the information "in the words and figures following":—

"NAPA COUNTY, CAL., June 1, 1885.

"On or before June 1, 1886, I promise to pay to H. C. Phillips, or order, the sum of two thousand dollars, for value received, drawing interest at the rate of ten per

cent per annum. This note is secured by mortgage, and is a part thereof, bearing even date.

"Witness, M. SILBAUGH.

"C. H. FITCH.

(Indorsed)

"H. C. PHILLIPS."

At the trial, the instrument introduced in evidence was in all respects like that set forth in the information, except that the note given in evidence did not contain the word "to" immediately before the words "H. C. Phillips, or order."

Counsel for defendant objected to the promissory note offered as irrelevant, incompetent, and immaterial, and because of the variance. The court overruled the objection, and defendant duly excepted to the ruling.

Counsel justly claim that the rule which requires that an instrument pleaded *in hac verba* must be proved as laid is not one of construction, but a rule of identity and description.

It is said by Wharton that when an indictment undertakes to set forth a document *in hac verba*, or according to its "tenor," or "as follows," or "in words and figures following," then *any* variance as to the words of the document, unless such variance be a mere fault of spelling, is material. He adds: "But it is otherwise as to the variance of a letter amounting only to misspelling." (Crim. Ev., sec. 114.)

It is not, however, only when rule *idem sonans* can be applied that the variance is immaterial. A misspelling has been held not to be a fatal variance when the word as spelled in the instrument means nothing, and has a different sound from the word intended, as "undertood" for "understood." The variance of a letter or the omission of a letter, to be material, must change the word attempted to be written into another word having a different meaning. (Wharton's Crim. Pl. & Pr., sec. 173.) Wharton, citing Heard's Criminal Pleadings and Taylor's Evidence, adds: "The great rigor of the old English law in this

respect was one of the consequences of the barbarous punishments imposed. A more humane system of punishment was followed by a more rational system of pleading." (Wharton's Crim. Pl. & Pr., sec. 173.)

Bishop, in his work on Criminal Procedure, thus lays down the rule: "If the indictment professes to set out a written instrument by its tenor, whether the law has made so exact an averment necessary in the particular case or not, the proof must conform thereto with *almost* the minutest precision." (Sec. 487.)

Section 1021 of our Penal Code provides: "If a defendant was formerly acquitted on the ground of variance between the indictment or information and proof, . . . it is not an acquittal of the same offense. (See also sec. 1165.) In *Butler v. State*, 22 Ala. 48, it would seem that the note was set forth in full in the indictment. The court said that to render the note admissible, "it is not necessary that there should be a literal correspondence between it and the papers set out in the counts under which it is offered. If the correspondence be such as to prevent the prisoner from being a second time in jeopardy for the same cause should he be acquitted, . . . it will be sufficient."

The case of *Quigley v. People*, 2 Scam. 301, is very like that now before us. It was there held that a note payable to "B. Aymar *or* bearer" was properly admitted in evidence when the description *in hac verba* was "B. Aymar, bearer."

In *State v. Street*, Tayl. 158, an omission of a figure, which "changed the sense," was held fatal.

In *United States v. Mason*, 12 Blatchf. 497, the court recognized the rule that where an indictment purports to set forth an exact copy of a bank bill, the description must conform to the instrument given in evidence, but added: "A mere literal variance will not be fatal." There the indictment omitted the word "to" from the phrase "pay to the bearer." It was held the variance

was not material, because the defect was not such as "changed the sense" in any way.

In an indictment an order was said to be signed by "Jno. Hulse"; the order offered in evidence appeared to be signed "Jna. Hulse"; in the indictment the place was called "Fayelville," in the order it was "Fayetville." Held, not fatally variant. (*United States v. Hinman*, Bald. 293.)

We think the true rule is, that if the variance does not change the sense in any way, it is not material. We are not to be understood as saying that when a contract alleged to have been forged is set forth in the indictment or information in words and figures, any other contract is admissible the *legal effect* of which is the same as that alleged and set forth in terms in the indictment; but that, when in the indictment a word found in the instrument proved is omitted from the instrument as recited, as when a word is inserted in the instrument described which is not in the instrument proved, and the change in no manner or for any purpose alters the signification, the variance is unimportant. Applying the rule to the case at bar, the court did not err in overruling the objection to the note offered in evidence.

Appellant insists that all the testimony of the witness Elgin as to what took place after the delivery of the note alleged to be forged (and the mortgage purporting to secure it) was inadmissible; that the passing of the note was complete when it was delivered to the witness; and that it was then delivered to Elgin, as security for a past indebtedness due from defendant to *Liddell*. And in this connection it is urged: 1. That *Elgin* was not injured or defrauded; and 2. That an intent to defraud was not proved by proving that the note was deposited as security for a past indebtedness.

The jury were authorized to infer from the evidence that, while the note was originally deposited with *Elgin* as agent of *Liddell* as security for the debt due the latter

(to be retained until the defendant should borrow money on the note and mortgage and pay the Liddell debt), Elgin was subsequently induced by the defendant to furnish a team, drive him or have him driven to Napa, in order to have the mortgage recorded, where, as defendant asserted, he believed he could borrow money on the second note.

The witness Elgin testified that he did furnish a carriage and drive the defendant to Napa, in compliance with defendant's request.

It was fairly inferable from the transaction that it was understood between the parties that the note alleged to be forged should be retained by Elgin as security for the expense to which *he* should be put in furnishing the team, and for his services in driving it. And there was evidence to sustain a finding that from the time of the agreement to furnish a team, etc., Elgin received and held the note as security, not only for the debt due Liddell, but for the expenses to which he should be put by reason of that agreement. In other words, there was evidence tending to prove that the note was used to secure a valuable benefit from Elgin.

Appellant urges that the court erred in admitting evidence of the assignment of the mortgage, inasmuch as the assignment was made the day after the passing of the note and the recording of the mortgage, and after Elgin had incurred the expense of a team, and his service had been performed, and after he had paid the recorder's fee for registering the mortgage; that the assignment was no part of the *res gestæ*, and was in no way connected with the offense charged,—the uttering or passing of the forged note.

But we think with the court below that the assignment of the mortgage was admissible as tending to show the intent of the defendant in passing the note to Elgin. The jury were clearly instructed that the defendant was not charged in the information with forging or uttering the

mortgage, and even if the mortgage was forged or feloniously passed, that fact would not justify a verdict against the defendant, but the fact could only be considered as tending to prove his intent in passing the note.

It is insisted that the expense to which the witness Elgin was put was not incurred "upon the strength of the note, but of the mortgage." The mortgage purported to secure the note; Elgin (there was evidence to prove) was to retain the note; and the evidence tended to show that Elgin was induced to retain the note as security for *his* expenses by defendant's promise to record the mortgage.

Appellant claims the court violated the constitution by charging as to matter of fact. (Art. 6, sec. 19.) The court said: "It appears by the testimony that defendant gave one Liddell a check," etc.,—proceeding to state matters as to which there was no conflict in the testimony. Of course, this mode of charging a jury should be carefully avoided. But it has been held here that an instruction assuming a fact does not demand a reversal if the fact is admitted, or there is no shadow of conflict of evidence with respect to it.

In stating the testimony, the trial judge should be careful to give the very words, or the substance of the words, of a witness.

The witness Silbaugh testified that he did not subscribe the note or mortgage as a witness, and in effect that he did not as a witness thereto swear before the notary to the execution of the mortgage. Elgin testified that Silbaugh did swear to the execution of the mortgage, as appears in the notarial certificate. The testimony of Elgin contradicted, and if credible disproved, the testimony of Silbaugh. The declaration of Silbaugh to Elgin, if made, that Fitch signed the note and mortgage in his presence, tended to impeach his testimony on the stand that neither were signed by Fitch in his presence. But Silbaugh's declarations to Elgin were not evidence

that Fitch in fact signed the note or mortgage. If Silbaugh was impeached, the jury could disregard his testimony. The court was justified in so informing the jury, and in informing them that the discarding of his testimony did not control in determining whether the note was forged, but left that question to be decided on the other evidence.

Other instructions were asked by the defendant and refused. But the jury were charged substantially as requested.

Judgment and order affirmed.

Ross, J., MYRICK, J., SHARPSTEIN, J., and MCKEE, J., concurred.

[No. 9393. Department Two.—June 26, 1886.]

IN THE MATTER OF THE ESTATE OF JEAN P. RICAUD,
DECEASED. FRANCOIS LARROCHE ET AL., EXECUTORS,
ETC., APPELLANTS, v. MARIA RICAUD ET AL.,
RESPONDENTS.

ESTATE OF DECEDENT — COMMISSIONS OF EXECUTOR — LAND NOT BELONGING TO ESTATE. — The executors of the last will of a deceased person are not entitled to commissions upon the value of a piece of land of which they had taken possession, and which was included in their inventory as a part of the property of the estate, where it is afterwards determined, in an action brought against them to recover the possession, that the land did not belong to the estate.

APPEAL from an order of the Superior Court of the city and county of San Francisco settling the account of the executors of a deceased person.

The appeal was taken by the executors. The further facts are stated in the opinion of the court.

Jarboe, Harrison & Goodfellow, for Appellants.

Under section 1618 of the Code of Civil Procedure, the executor is entitled to commissions upon the amount of

the estate accounted for by him. The words "accounted for," as used in this section, mean for which he is accountable, i. e., for which he may be required to give an account, or in other words, the whole of the estate which may come into his possession. (*Wells v. Robinson*, 13 Cal. 133; *Richardson v. True*, 21 Vt. 676; *Drake v. Drake*, 82 N. C. 446; *Succession of Grant*, 4 La. Ann. 387; *Estate of Isaacs*, 30 Cal. 113.)

A. P. Needles, Selden S. Wright, H. A. Powell, and F. J. French, for Respondents.

The executors are not entitled to commissions on the land in question. (*Estate of Simmons*, 43 Cal. 543; *Estate of Marvin*, Myrick's Prob. Rep. 166; *Estate of Reck*, Myrick's Prob. Rep. 58.)

MCKEE, J.—On the 1st of April, 1877, Jean P. Ricaud died in the city and county of San Francisco, seised and possessed of certain real property, which was inventoried by the executors of his last will and testament as assets of his estate, and appraised at seven thousand five hundred dollars. But at the time of his death there was pending against him an action to recover possession of the property; and after his death the executors took possession of the property, assumed defense of the action, and continued to defend it until October, 1882, when judgment was finally rendered against them; after which they surrendered the possession to the plaintiff in the judgment.

Before the surrender the executors had collected from the property rents amounting to the sum of \$2,608.50, for which they accounted in their annual accounts. On the filing of the final account of their administration, they presented a claim of \$900.99 for commissions upon the sum of \$19,524, being the appraisement contained in the inventory; but the court, upon the hearing of an exception taken to the allowance of the claim, deducted

the sum of \$7,500, — the appraised value of the real property which the executors had surrendered to the true owner, — and awarded the executors commissions upon the sum of the balance of the appraisement in the inventory and of the rents collected for which the executors had accounted.

It is insisted that the executors were entitled to commissions on the entire appraisement contained in the inventory, and that is the question.

The whole of the estate of a deceased person which may come into the possession of the executor or administrator (with the interest, profit, and income thereof), except such parts of it as may have decreased or been destroyed without his fault, must be accounted for, upon the basis of the inventory, in the final settlement of the administration. In such accounting, the court, in the exercise of its jurisdiction of the estate and its administration, is authorized to allow the executor or administrator for all necessary expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conducting necessary proceedings or suits in courts, and for his services commissions allowed by law "upon the amount of the estate accounted for by him." (Code Civ. Proc., secs. 1613-1618.) The value of the estate taken into his possession *and accounted for* by him is therefore made the basis for the allowance of commissions. (*In re Simmons*, 43 Cal. 543; *In re Isaacs*, 30 Cal. 113.)

Admittedly, the executors took possession of the land, which was inventoried as part of the estate and appraised at seven thousand five hundred dollars. But the estate had no other interest in it than possession. That interest the executors took and maintained until it was taken from them by process of law; they have accounted for it, and were allowed commissions upon the rents which it yielded. But the land itself did not belong to the estate; it was therefore no part of its assets; and its value did

not form any part of the value of the estate in the possession of the executors for which they were chargeable; therefore, as it was not legally included in the value of the estate taken into their possession and for which they had to account, they were not entitled to commissions upon it.

Order affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 11470. Department One.—June 28, 1886.]

MARIA SCHAMMEL, RESPONDENT, *v.* HENRY SCHAMMEL, APPELLANT.

APPEAL — DIVORCE — ALIMONY AND COUNSEL FEES — CERTIFICATE TO IDENTITY OF PAPERS. — On an appeal from an order for counsel fees and alimony, made *pendente lite* in an action of divorce, the certificate of the trial judge is a sufficient identification of the papers used on the hearing of the motion.

D. — MOTION TO DISMISS APPEAL — CERTIFICATE MAY BE FILED ON HEARING. — If the transcript fails to contain such a certificate or other evidence of identification, and a motion is made to dismiss the appeal on that ground, the appellant may cure the omission, under rule 13 of the Supreme Court, by presenting and filing at the hearing of the motion to dismiss a certificate of the judge to the identity of the papers.

APPEAL from an order of the Superior Court of the city and county of San Francisco for the payment of alimony and counsel fees.

Motion to dismiss appeal on the ground that the record failed to identify the papers used on the hearing in the court below. At the hearing of the motion to dismiss, the appellant filed a certificate of the judge of the court below identifying the papers in the transcript as those used by him on the hearing. The further facts are stated in the opinion.

Fisher Ames, and Dunne & Davidson, for Appellant.

Davis Louderback, and Cary, Sullivan & Sullivan, for Respondent.

FOOTE, C.—This is an appeal from an order made *pendente lite*, for counsel fees and alimony, in an action of divorce.

The only matter concerning it now to be considered is the motion to dismiss that appeal.

That motion alleges as grounds why it should be sustained:—

“1. Because said transcript of the record on appeal from said order fails to authenticate, identify, or show what papers were used on the hearing of said motion on the 16th of October, 1885, for alimony and counsel fees, and upon which said order was made and entered.

“2. Because there is no bill of exceptions or anything else in the record to show what papers were used on the hearing of said motion for alimony and counsel fees in the court below, and upon which the order appealed from was founded.”

In the case of *Pieper v. Centinella Land Company*, 56 Cal. 173, this court declared that the certificate of a judge of the trial court, similar to the one now under consideration, except that the former appeared in the transcript of the record of the cause, and the latter does not, was a sufficient identification of the papers used on the hearing of the motion.

And in that case the following language was used:—

“The statute (i. e., Code Civ. Proc., sec. 951) prescribes no mode by which it shall be made to appear to this court on appeal what papers were used on the hearing of such a motion as the one before us. Under such circumstances, this court has the power to prescribe by a rule how such papers can be brought before it on appeal. This it can do in order to make effectual the appeal given by law. As it has such right to make a rule in advance, it has a like power to ratify and adopt the mode followed in this case. We shall consider the papers named in the judge's certificate as properly before us.”

Under rule 18 of this court, “exceptions or objections

to the transcript, . . . or any technical exception or objection to the record in civil cases affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken and notified to the appellant in writing, at least five days before the hearing, or they will not be regarded; *and when so noted, it shall be the duty of the appellant to present and file at the hearing of the cause such additional record, certificate, or other matter, if such there be, to remove or answer the objection or exception so taken;* otherwise such objection or exception, if well taken, shall prevail."

The present proceeding to dismiss the appeal is well taken unless the certificate of the judge who heard the motion in this case is sufficient under that rule, or ought to be so held independent of that rule.

We are of opinion that such certificate is sufficient, both under that rule, and for the reason that as it serves the sole purpose of the identification of papers (for which no rule of law is laid down in the statutes), there is no more reason why the judge's certificate in this case is not as good for the purpose intended as those sometimes filed, made by clerks of the trial court about some omission in the record, as to which they are competent to certify, although they are not thus competent in such a matter as the present.

The judge's certificate as to such papers as here involved, if properly made, is as sufficient and should be as fully considered as an identification of such papers out of the transcript as in it, if presented at the proper time.

The motion to dismiss should be denied.

BELCHER, C. C., and SEARLES, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the motion is denied.

[No. 9068. Department Two.—June 28, 1886.]

MINNA K. DU BRUTZ, ADMINISTRATRIX, ETC., ET AL.,
RESPONDENTS, *v.* ISAAC JESSUP, APPELLANT.

CONTRACT — BREACH OF — ACTION TO RECOVER FOR — PLEADING. — In an action to recover damages for the breach of an alleged contract, the complaint is insufficient if it merely alleges a promise without averring its breach, or if it assigns a breach of something which is not alleged to have been promised.

Id. — CONTRACT FOR SALE OF LAND — REFUSAL TO EXECUTE AGREEMENT FOR SALE. — The action was brought to recover damages for the breach of a contract whereby the plaintiffs agreed to procure a purchaser of certain land belonging to the defendant, at a fixed price, to be paid in installments at stated times, in consideration of which the defendant promised to pay them a certain compensation. The complaint, after setting forth the contract, alleged that the plaintiffs found an intended purchaser, and assigned as a breach of the contract the refusal of the defendant to join with the purchaser in the execution of an agreement for the sale of the land embodying the terms upon which the defendant had authorized the plaintiffs to negotiate the sale. *Held*, that the refusal of the defendant to execute the agreement was not a breach of the contract.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion.

Crittenden Thornton, and F. H. Merzbach, for Appellant.

B. S. Brooks, William Leviston, and T. D. Riordan, for Respondents.

FOOTE, C. — This was an action brought by James L. Hussey and F. C. M. Du Brutz against Isaac Jessup, to recover the sum of twenty-five thousand dollars for a breach of contract.

The original plaintiffs have died since the institution of this suit, and the administratrix of the one and the assignee of the other have become substituted parties to the record.

The trial court, sitting without a jury, rendered judg-

ment for the sum of two thousand dollars and costs, and from that and an order refusing a new trial the defendant appeals.

The defendant contends that upon the face of the record the judgment is erroneous, because, as he alleges, said judgment was rendered on findings upon the first count of the complaint alone, which count does not state facts sufficient to constitute a cause of action.

The first count in the complaint is upon a special contract to procure a purchaser of a certain tract of land belonging to the defendant, at a certain fixed sum, for which the plaintiffs were to receive a certain compensation.

The second count is an ordinary count in debt for twenty-five thousand dollars, for work, labor, and services done and rendered.

The first count reads substantially as follows: That the defendant was the owner of a certain tract of land in the village of San Rafael, Marin County, and being desirous of selling the same, entered into a contract with the plaintiffs that they should procure the formation of a corporation, which should purchase said land for the sum of twenty-five thousand dollars, to be paid in certain installments at certain stated times, etc.

And for the work and labor, skill, care, and diligence, journeys and attendances, of the said plaintiffs to be done, performed, and bestowed by them in and about the disposing of and settling of the said premises, in the manner and upon the terms aforesaid, and at his special instance and request, *the said defendant then and there undertook and promised the plaintiffs to pay unto them whatever amount the purchaser should pay over and above the sum of twenty-five thousand dollars, with the interest thereon as aforesaid;* and that the plaintiffs undertook the performance of the work on those terms, and procured the due incorporation of a corporation named the San Rafael Property Union, and obtained from the latter an

agreement or offer to purchase the lands on the terms agreed to by the defendant; a written instrument, setting out the terms of the agreement of sale, intended to be executed on the part of the defendant and the said corporation, was executed under the seal of the said corporation and tendered to the defendant for his signature thereto (a copy of which is annexed to the complaint, marked "Exhibit A"); that the said writing was in strict accordance with the terms upon which the defendant had authorized the plaintiffs to negotiate a sale of the tract of land; *but that the said defendant then and there refused to execute the said agreement; and though often requested, he has hitherto refused and still does refuse to execute the same.* By means whereof the said plaintiffs have suffered damages in the sum of twenty-five thousand dollars, which, according to the terms of their agreement, was to be paid to them in United States gold coin.

According to the complaint, there was no agreement between the defendant and the plaintiffs that any writing should be executed by the defendant to them, or to any other person or corporation, other than "a good and sufficient deed of bargain and sale" to the purchaser of his land at the proper time, which time had not under said agreement arrived.

Therefore the breach alleged in the complaint, that the defendant would not execute the written agreement presented to him, is not a breach of any promise set out in the complaint as having been made by him, and if he never made any such promise, the assignment of the breach thereof shows no cause of action against him.

The promise which he by the complaint is alleged to have made is that he would pay the plaintiffs whatever amount the purchaser *should pay* over and above the sum of twenty-five thousand dollars, with interest thereon as aforesaid.

There is no breach of that promise alleged by the complaint to have taken place on the part of the defendant.

ant, but it is alleged that he has refused to execute a certain agreement (which the complaint nowhere alleges he was under obligation or promise to execute), and that thereby damage has accrued in favor of the plaintiffs in the sum of twenty-five thousand dollars.

Thus we perceive that in the first count of the complaint there is no breach assigned of the promise alleged to have been made.

How can a cause of action exist upon the mere statement of a promise without alleging its breach? And if a breach is assigned of something which it not alleged in the complaint to have been promised, where is there any cause of action alleged? There was no sufficient cause of action stated in the first count, and there was no finding of facts by the court upon the second count of the complaint.

The judgment was rendered on findings under the first count alone, which states no sufficient cause of action. It would seem, therefore, under section 434 of the Code of Civil Procedure, and the reasoning of this court in *Barron v. Frink*, 30 Cal. 486, that the judgment and order in this case should be reversed, and cause remanded, with leave to plaintiffs to amend their complaint.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT. — For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded, with leave to plaintiffs to amend their complaint.

[No. 9159. Department Two.—June 29, 1886.]

WILLIAM F. MCALESTER, APPELLANT, *v.* JOHN LANDERS, DEFENDANT, AND THE CALIFORNIA BRICK COMPANY, INTERVENORS, RESPONDENTS.

LEASE — QUIET ENJOYMENT — COVENANT OF TITLE AND RIGHT TO CONVEY — BREACH OF. — A lease with an express covenant for quiet enjoyment implies a covenant that the lessor has title to the property leased, and power and right to convey it; and such implied covenant is immediately broken if the lessor has made a prior lease of part of the demised premises, which is still outstanding when the subsequent lease is executed.

ID. — EVICTION — DISPOSSESSION NOT NECESSARY. — A covenant for quiet enjoyment in a lease is not broken without an eviction of the lessee, either actual or constructive. To constitute an eviction, the lessee need not be actually dispossessed.

ID. — RECOVERY IN TRESPASS AGAINST LESSEE. — A recovery in an action of trespass brought by a prior lessee against a subsequent lessee of the same land is a sufficient eviction to constitute a breach of the covenant for quiet enjoyment contained in the subsequent lease, although the action was not commenced until after the expiration of the prior lease.

ID. — MEASURE OF DAMAGES. — In such a case, the detriment caused by the breach of the covenant cannot be less than the amount of the judgment for damages and costs recovered against the covenantee.

ID. — ACTION FOR RENT — LESSEE MAY RECOUP DAMAGES — COUNTERCLAIM. — When damages have been sustained by a lessee on account of the breach of a covenant in the lease by the lessor, if an action for rent is brought, the lessee may elect to recoup his damages from the rent, or bring a separate action therefor; and the fact that the lessee has paid the rent for the greater part of the term will not deprive him of the right to recover his damages for the entire term by way of counterclaim.

ID. — PAYMENT OF RENT — EXONERATION OF GUARANTOR. — A guarantor for the payment of the rent reserved in a lease is exonerated from liability on his guaranty if the lessor has, by the breach of a covenant in the lease, caused damages to the lessee equal to the amount of the rent.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion.

Dunn & Davidson, and Robert L. Behre, for Appellant.

Robinson, Olney & Byrne, for Defendant and Respondent.

William Reade for Intervenor and Respondents.

BELCHER, C. C.—The facts out of which this case arose are as follows:—

In August, 1870, the plaintiff leased to P. M. Darcy and Edward Naughton a tract of 515 acres of land, situate in Marin County, for a dairy and stock ranch. The lease was for a term of five years, with a privilege of two months' extension, and it remained in full force during the whole term named.

In October, 1874, the plaintiff leased to one Mosheimer, a tract of forty-five acres, which embraced twenty acres then leased to and in the possession of Darcy and Naughton, for the purpose of making bricks. The lease to Mosheimer was for a term of seven years, commencing October 10, 1874, and it contained a covenant that the lessee should and might peaceably and quietly have, hold, and enjoy the demised premises for the term aforesaid without molestation by, through, or under the act or acts of the lessor, his heirs or assigns. The rent reserved was nine hundred dollars for each six months of the term, payable in advance, on the 10th of October and April of each year.

Upon the twenty acres, covered by both leases, there were certain springs of water, which were essential to the first lessees for the purpose of watering their stock, and absolutely essential to the second lessee for the purpose of making bricks.

Shortly after its execution, Mosheimer, with the written consent and approval of the plaintiff, assigned his lease to the California Brick Company, and the defendant Landers, in consideration of the assignment, and that the company should have and enjoy quiet and peaceful possession of the premises demised, executed a written guaranty to the plaintiff that the brick company would pay the rent reserved in the lease, and in default thereof he would pay the same.

In March, 1875, the California Brick Company, being ignorant of the lease to Darcy and Naughton, and the

twenty acres covered by both leases being apparently unoccupied by any one, entered upon the said twenty acres, and proceeded to construct buildings and build reservoirs, and to dig out and excavate the springs of water thereon, and to use the soil for the manufacture of bricks; and it continued thereafter in the possession and occupation thereof during the remainder of the term named in its lease.

In July, 1877, an action was commenced by Darcy against the plaintiff here, McAlester, and the California Brick Company, to recover damages for the entry by the company upon the premises leased as aforesaid to Darcy and Naughton, and taking possession of the springs of water thereon, and permitting its horses to enter thereon and upon other lands desmised to them, between the thirty-first day of March, 1875, and the fifteenth day of October, 1875, the day of the expiration of their lease.

The plaintiff employed counsel, and defended the action in his own behalf and in behalf of the company, but such proceedings were had in it that in November, 1881, judgment was rendered in favor of Darcy and against the company for \$2,000 damages and \$318.80 costs, the principal element of damages proven at the trial being the exclusion of Darcy and Naughton and their cattle from the springs of water.

The company paid the rent due under its lease up to July 10, 1880, and thereafter refused to pay it, leaving unpaid at the expiration thereof the sum of \$2,250, to recover which from the defendant on his guaranty this action was brought.

Upon these facts, the court below was of the opinion that there had been such a breach of the covenants, express and implied, in the lease under which the company held, as exonerated the defendant from liability on his guaranty.

Judgment was then entered in favor of the defendant

and the intervenor, and the plaintiff appealed, the case coming here on the judgment roll.

1. The lease to Mosheimer, in addition to the express covenant for quiet enjoyment, contained an implied covenant that the lessor had title to the property leased, and power and right to demise it. (Rawle on Covenants for Title, 472.)

As the twenty acres on which the springs were situated had already been leased to Darcy and Naughton, and their lease was still outstanding and valid, the lessor had at that time no power to demise that part of the property, and his covenant was immediately broken.

2. As to the covenant for quiet enjoyment, the rule is that there can be no breach without an eviction, actual or constructive. But what acts will constitute such an eviction it is often difficult to determine. It is settled, however, that there need not be an actual dispossession.

It was so held in *McGary v. Hastings*, 39 Cal. 367. In that case the plaintiff purchased with a covenant for quiet enjoyment, and went into possession of a parcel of land which was a portion of a supposed Mexican grant. The grant was afterward rejected, and the plaintiff then, under an act of Congress which he assisted in getting passed, bought the government title. This was held to be an eviction.

In *Loomis v. Bedell*, 11 N. H. 74, a prior conveyance had been made by the covenantor. Upon the death of the prior grantee, the land was sold by his administrator at public auction, and purchased by the plaintiff, and it was held that these facts constituted an eviction.

In *Dyett v. Pendleton*, 8 Cow. 727, a majority of the court allowed the tenant to regard as an act of ouster from a tenement which he hired, consisting of part of a dwelling-house, the suffering of prostitutes openly to occupy the other part of the house. In *Lewis v. Payne*, 4 Wend. 428; the court, referring to *Dyett v. Pendleton*, *supra*, say: "It seems to be held that any obstruction by

the landlord to the beneficial enjoyment of the demised premises, or a diminution of the consideration of the contract by the acts of the landlord, amounts to a constructive eviction." In *Williams v. Shaw*, Law Rep. and Term Rep. 630, the Supreme Court of North Carolina held that there was a breach of the covenant for quiet enjoyment when one claiming a superior title obtained a judgment for damages in an action of trespass *quare clausum fregit* against the covenantee. Taylor, C. J., said: "It is wholly immaterial whether the eviction is effected by legal process or by private disturbance or molestation. But if a legal recovery were necessary, I should not hesitate in considering the judgment in an action of trespass *quare clausum fregit* as effectual for that purpose." Daniel, J., said: "The land being woodland, and no one in actual possession, the possession then followed the title, and that the court and jury said was in McKetham. This is equivalent to an eviction under legal process." Ruffin, J., said: "I am of opinion that the recovery in the action of trespass against the plaintiff, as set forth in the declaration, is such a disturbance of his possession as will form a breach of the defendant's covenant for quiet possession. In that respect, it is tantamount to an actual eviction."

The ruling in that case we think in point, and it should be followed here. It is true, the action of trespass involved in this case was not commenced till after the expiration of the Darcy and Naughton lease, and judgment in it was not recovered till the expiration of the Mosheimer lease; still, the judgment must be held to have related back to the commencement of the action, and to have operated to disturb the company's possession during the whole time the action was pending.

3. The detriment caused by the breach of the plaintiff's covenants cannot be less than the amount of the judgment for damages and costs recovered against the covenantee. That amount may properly be classed as

"expenses properly incurred by the covenantee in defending his possession." (Civ. Code, sec. 3304.)

4. When damages have been sustained by a lessee by a breach of the lessor's covenant, if an action for rent is brought, the lessee may recoup his damages from the rent, or at his election he may bring a separate action for the recovery of the damages. (*Kelsey v. Ward*, 38 N. Y. 83.)

And the fact that the lessee has paid the rent for the greater part of the term will not deprive him of the right to counterclaim his damages for the entire term. (*Cook v. Soule*, 56 N. Y. 420.)

5. Under the code, "a guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal in respect thereto in any way impaired or suspended." (Civ. Code, sec. 2819.)

As the brick company had a right to recoup its damages to the full amount of rent claimed by plaintiff, and as it appeared and by its complaint in intervention set up that right, it is clear, we think, that the plaintiff's rights against the company were impaired, and the case is brought within the provisions of the above-quoted section.

In our opinion, the court below did not err in holding that the defendant was exonerated from liability on his guaranty, and the judgment should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 6664. Department Two.—June 29, 1886.]

ALFRED A. COHEN, RESPONDENT, *v.* JAMES M. GRAY ET AL., APPELLANTS.

PRELIMINARY INJUNCTION — CESSATION OF RESTRAINING ORDER. — In an action for an injunction, the force of a restraining order previously issued ceases upon the granting of an injunction *pendinge lite*.

ID. — OPENING PUBLIC STREET — REPEAL OF ACT AUTHORIZING. — An injunction to restrain the board of trustees of the town of Alameda from proceeding with the opening of a public street under the act of March 23, 1876, granted after the repeal of the act, is unnecessary, irregular, and erroneous.

APPEAL from an order of the late District Court of the Fifteenth Judicial District of the city and county of San Francisco granting a preliminary injunction.

The facts are stated in the opinion of the court.

Rhodes & Barstow, and *John Ellsworth*, for Appellants.

J. P. Hoge, and *Lake & McKoon*, for Respondent.

McKEE, J. — This is an appeal from an order granting a preliminary injunction in an action brought to obtain a decree to perpetually enjoin the defendants, who were members of the board of trustees of the town of Alameda, from passing or voting upon any proceedings pending before the board for the opening of a public street through a tract of land belonging to the plaintiff. The action was brought upon the ground that the proceedings were taken, and would be continued, for the pecuniary aggrandizement of one of the trustees, with whom, as alleged, the other trustees had conspired to carry out his purposes, regardless of the rights of the plaintiff, and that the proceedings already taken, and as contemplated by them for that purpose, were and would be fraudulent and corrupt.

The complaint in the action was filed on the 30th of July, 1877, and on that day the judge of the court made an *ex parte* order on the defendants to show cause, on the

10th of August, 1877, why an injunction should not be issued; and in the mean time restrained the defendants from further acting upon the proceedings pending before the board of trustees. The restraining order was granted without any undertaking. But on the 17th of August, 1877, on motion of defendants, the plaintiff was ordered to file an injunction bond, which he did on the same day; thereupon defendants filed their respective answers to the complaint, in which they specifically denied its allegations of fraud, conspiracy, and corruption; but the restraining order was continued until the 2d of August, 1878, when the judge of the court, having heard and considered the order to show cause, upon the pleadings and affidavits filed, granted and allowed an injunction *pendente lite*.

Upon the entry of that order, the restraining order spent its force. (Code Civ. Proc., sec. 530; *Hicks v. Michael*, 15 Cal. 107.)

But the order of the 2d of August for a preliminary injunction was erroneous, because the condemnatory proceedings sought to be enjoined were commenced under a statute entitled "An act to provide for opening streets in the town of Alameda," approved March 23, 1876, which was repealed on the 1st of April, 1878, (Stats. 1877-78, p. 964.), four months before the date of the order. The threatened wrong against the plaintiff was therefore averted by the intervention of the legislature, and the proceedings before the board fell of their own weight. So that on the 2d of August, 1878, there were no proceedings to enjoin. An injunction was therefore useless and unnecessary, and the order for an injunction was irregular and erroneous. (*Linden v. Case*, 46 Cal. 171; *Bucknall v. Story*, 36 Cal. 70; *Houghton v. Austin*, 47 Cal. 647; *N. P. R. R. Co. v. Carland*, 5 Mont. 146; *Gates v. Lane*, 49 Cal. 266.)

Order reversed and cause remanded.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 9449. Department Two.—June 29, 1886.]

LEONARD A. SAVILLE, ADMINISTRATOR, ETC., OF
DAVID SAVILLE, DECEASED, APPELLANT, *v.* JOHN B.
FRISBIE ET AL., RESPONDENTS.

PRACTICE — REFERENCE — WANT OF DILIGENCE IN PROSECUTION — DISMISSAL. — The reference of an action for trial and judgment does not deprive the court of power to order its dismissal for want of diligence in its prosecution before the referee.

Id. — The action was commenced on the 31st of March, 1860. On the 15th of May, 1861, it was referred to a referee to report a judgment. In the years 1862 and 1863, the plaintiff introduced a portion of his evidence, but no further steps were taken in the matter until June, 1863. In August, 1868, the original plaintiff died, and on the 24th of February, 1881, his administrator was substituted in his place. The administrator knew of the condition of the action for at least ten years before his substitution. On the 5th of November, 1883, the court made an order dismissing the action for want of diligence in its prosecution. *Held*, that the order was proper.

APPEAL from an order of the Superior Court of the city and county of San Francisco dismissing the action.

The facts are stated in the opinion of the court.

Philip G. Galpin, and W. S. Wood, for Appellant.

Henry P. Irving, H. S. Brown, W. W. Stow, B. S. Brooks, and H. W. Carpentier, for Respondents.

THORNTON, J. — The order of the 24th of February, 1881, dismissing this case, from which an appeal was prosecuted to this court, was here reversed in May, 1883, on the ground that the opportunity had not been afforded the plaintiff to show cause why the order should not be made. (11 Pac. C. L. J. 354.) The *remittitur* from this court was filed in the court below on the nineteenth day of June, 1883, and the motion to dismiss the action was renewed by a notice served on plaintiff on the 14th of July following. The motion was heard in October, 1883, and the order dismissing the action was made on the fifth day of the next month. The motion was made on

the ground that plaintiff had failed to prosecute the action with reasonable diligence, or any diligence.

There was certainly great delay in prosecuting the action. It was commenced on the 31st of March, 1860, and referred to S. H. Dwinelle, Esq., on the 15th of May, 1861, to report a judgment. The plaintiff had not finished putting in his evidence when the notice of the motion was given.

Evidence was introduced before the referee in the years 1862 and 1863. It does not appear that any further steps in the matter of the introduction of evidence were taken until June, 1883. David Saville, in whose name the action was originally brought, lived more than five years after the evidence introduced in 1863 was taken before the referee.

During the period above mentioned, nothing further was done in the cause. In August, 1868, David Saville died. The present plaintiff was appointed administrator of the estate of David Saville on the 8th of February, 1869, but was not substituted as a party plaintiff until the 24th of February, 1881,—more than twelve years after his appointment. There was evidence before the court below that the present plaintiff knew of the action and its condition for at least ten years before he was made a party.

We see no reason why the reference of a cause for trial and judgment, and its pendency before the referee, should deprive the court of its full power to order its dismissal for want of diligence in its prosecution before the referee. We find no irregularity in the court's making the order, and we think it justified by the circumstances before it. There is no error in the record.

Judgment affirmed.

SHARPSTEIN, J., and MCKEE, J., concurred.

Hearing in Bank denied.

[No. 9286. In Bank.—June 29, 1886.]

JOHN McBROWN, APPELLANT, *v.* WILLIAM H. DALTON, ET AL., RESPONDENTS.

PARTITION — AGREEMENT BETWEEN CO-TENANTS — TRUST — DECREE. — Pending a suit for the partition of a ranch, the plaintiff, who owned an undivided interest therein, conveyed his interest, except a specified portion reserved to himself, to the defendants, a committee of trustees acting on behalf of a league formed of certain tenants in common of the ranch, of which the plaintiff was a member. At the time of the conveyance, the defendants executed and delivered to the plaintiff a writing by which they consented and agreed that he should have set off to him by the decree in the partition suit the portion so reserved, and that they would use their influence to secure the same to him. By a subsequent transaction, to which the plaintiff was not a party, the defendants acquired title to the undivided interest of one Gates, a tenant in common in the ranch. The interlocutory decree in the partition suit, after determining the respective rights of the parties, adjudged that the interest of the plaintiff should be set off to him within the boundaries of the reservation made in his deed to the defendants. That portion of the ranch contained 3138 acres. Eight hundred and twenty-six acres of it were allotted and set apart to the plaintiff as his ascertained and adjudged interest; the remainder was allotted and set apart to Gates as his ascertained interest; while the interest acquired by the defendants under their deed from the plaintiff was allotted and set apart to them in a portion of the ranch wholly outside of the reservation. The final judgment, from which no appeal was taken, confirmed these allotments. *Held*, that the legal title acquired by the defendants to the portion of the reservation allotted to Gates was not held in trust for the plaintiff.

ID. — ACTION TO ENFORCE TRUST — PARTIES. — *Held further*, that the defendants held the legal title to the land, which they acquired from Gates and the plaintiff in trust for the members of the league, and that the plaintiff, as a member of the league, might enforce the trust in an action to which all the beneficiaries were parties, but not otherwise.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

James A. Waymire, Calhoun Benham, and G. F. & W. H. Sharp, for Appellant.

Edward J. Pringle, for Respondents.

MCKEE, J.—This case arises out of an original action in equity brought by the plaintiff against the defendants to compel a conveyance of the legal title to certain land and premises, which it is claimed they have received and hold in trust for him.

It appears by the complaint in the case that in the year 1865 the plaintiff was the owner of an undivided three-ninths interest in a ranch known as the "Bojorguez ranch," containing about twenty-five thousand acres; that in that year he sold and conveyed to the defendants "all his right, title, and interest" therein, except a specific portion, described by metes and bounds, which was then in his exclusive possession; that at the time of the sale the defendants stipulated, by an instrument in writing, that this portion should be allotted and set apart to him by the final decree of the court, in which there was then pending an action for the partition of the ranch; and that by the final decree rendered in that action the land thus reserved was in fact allotted and set apart for the defendants in this action, but they refuse to execute their trust by conveying it to him.

The defendants by their answer specifically deny the allegations of the complaint.

But it was proved on the trial of the cause, and the court below finds, that on the 19th of May, 1860, Horace Gates was the owner of an undivided one-ninth interest in the Bojorguez ranch, and commenced an action against several hundred persons named in the complaint in the action as defendants and tenants in common of the ranch, for partition of the same among them according to their respective interests; that one of these defendants was the present plaintiff, McBrown; that on the 31st of May, 1860, McBrown filed his answer to the complaint, in which he set forth that he was the owner in fee-simple absolute of an undivided three ninths of the ranch, derived by direct and mesne conveyances from the original owner, and that other persons, who were par-

ties defendants in the action, and were in possession of portions of the ranch, claiming interests therein by deeds from the same source of title, had no right or title adverse to him; and that the deeds under which they asserted their rights were ineffectual and void as to him.

After this answer was filed, McBrown and certain of the tenants in common, and defendants in the partition suit, about forty persons, including the defendants in this action, on the 1st of September, 1865, entered into an agreement for the formation of a land league to buy in for the use and benefit of the members of the league the undivided interests in the ranch claimed by "Horace Gates and other persons."

Under that agreement a league was organized, known as the "Bojorquez League," and the defendants in this action were appointed and acted as the executive committee of the league to make purchases. In that capacity the defendants purchased and acquired undivided interests in the ranch from Horace Gates and the plaintiff, McBrown. The purchase from McBrown was made on the 14th of March, 1865. On that day McBrown by deed conveyed to the defendants a portion of his interest in the ranch by the following description:—

"All his right, title, and interest, in law or equity, in possession or expectancy, in the ranch, reserving, saving, and excepting all that portion of said rancho lying and being in the southwest corner of said rancho, now in the possession of the said John McBrown, and more particularly described as follows, to wit: Commencing at the southwest corner of said rancho, and running thence easterly along and on the southwesterly boundary line of said rancho to the southeast corner of the said rancho; thence northerly along the easterly line of said rancho eight chains to the line of the Clark and Casanueva tract (so called); thence westerly along said line to the southwest corner of said Clark and Casanueva tract; thence northerly along the westerly line of said

tract to the northeast corner of John McBrown's fence or a point on said line easterly therefrom; thence westerly along and with the line of said fence to the fence inclosing the Potrero tract (so called); thence southerly along and round the Potrero fence to the intersection of John McBrown's fence with the Potrero fence; thence westerly along and in the same direction of said fence to the westerly line of said rancho; thence southerly along the westerly line of said rancho to the place of beginning."

Contemporaneously with the execution of the deed, the defendants executed and delivered to McBrown an instrument in writing which recited that, "in consideration of said deed, we consent and agree that he, the said McBrown, shall have set off to him in any decree of partition of said ranch that portion of the ranch reserved by said deed, and we will use our influence to secure the same to him, as the part reserved by him out of the interest which he held in the ranch before his deed to us."

After the defendants had in that manner acquired title from McBrown, they had themselves substituted in the partition suit as representatives of the interest thus acquired; and they filed an answer in which they alleged that at the date of the deed McBrown owned an undivided three ninths of the ranch, derived by deeds from three of the heirs at law of the original owner of the ranch, less certain interests which had been conveyed to other parties by his grantors *before* he had acquired their rights, and less certain interests conveyed by McBrown himself *after* he had acquired his rights; and that all the interest which he had in the ranch at the date of the deed vested in them, except the interest reserved in the tract described in the deed; and they asked that they be adjudged owners in fee of the said undivided three ninths, less the interest therein, conveyed *before and after* McBrown acquired his rights, and less the quantity

of the interest remaining in him in the tract reserved in the deed under which they claimed from him, and that the same be set apart to them, quantity and quality relatively considered.

As a defendant in the partition suit, McBrown himself continued to represent the interest in the ranch which remained in him after his deed to the defendants.

Upon the trial of the issues in the partition suit, the court found that Bartolome Bojorquez was the original owner of the Bojorquez ranch; that in 1851 he conveyed an undivided one-ninth interest in the ranch to each of his eight children, reserving an undivided ninth to himself; that Gates, the plaintiff in the action, derived title to an undivided one ninth thereof; that McBrown, the plaintiff in this action, derived title to an undivided three ninths thereof, of which he transferred by deed to W. P. Bullard an undivided one hundred and sixty-third interest, to L. A. Marshall an undivided one hundred and fifty-fifth interest, and to Dalton, Denman, Railsback, Martin, and Meacham, defendants in this action, by the deed of the 14th of October, 1865, an undivided seven thousand eight hundred and eighty-seven seventy-five thousand two hundred and sixty-fifths interest in the ranch, reserving to himself whatever interest remained in him as described in the deed. And by the interlocutory decree, it was adjudged that the said parties were respectively the owners in fee of the interests thus ascertained and settled, and were entitled to have the same set apart to them, quality and quantity relatively considered,—the interest of McBrown to be set apart to him within the boundaries of the portion of the ranch described in the deed of the 14th of October, 1865, as reserved.

That portion of the ranch contained 3138 acres. Eight hundred and twenty-six acres of it were allotted and set apart to McBrown as his ascertained and adjudged interest; the remainder, 2811 acres, was allotted and set apart

to Horace Gates for his ascertained interest; while the interest acquired by the defendants Denman, Dalton, Railsbach, Martin, and Meacham, from McBrown by the deed of the 14th of October, 1865, was allotted and set apart to them in a portion of the ranch wholly outside of the tract reserved by McBrown in that deed.

The final judgment confirmed and made effectual forever these allotments. The several parties to the judgment were adjudged to be the owners in fee of their respective allotments. From the judgment no appeal has ever been taken; it is therefore binding and conclusive upon all the parties to it.

But the judgment conferred no new or additional title upon the parties. It ascertained, awarded, and allotted to each his interest. Thereby the common possession which each had in the ranch before the rendition of the judgment became several and distinct; the unity of possession was severed, and each became entitled by the judgment to the exclusive possession of that part of the ranch which was allotted to him. McBrown therefore was the owner in fee of the tract of 826 acres allotted to him, and he is in the exclusive possession of it. No one questions his title to it. The defendants neither have nor claim any right or title to it, in trust or otherwise, adversely to him. Gates is the owner in fee of the remainder of the reserved tract described in the deed of the 14th of October, 1865, and he cannot be divested of his title or disturbed in the enjoyment of the land allotted to him, by a proceeding to which he is not a party.

It is true that the defendants here acquired Gates's interest in the ranch, in December, 1865, by a deed executed and delivered to them in consummation of a contract of sale of that interest entered into by him and them on the 26th of October, 1865,— twelve days after the execution and delivery of the deed of McBrown to the defendants. But the defendants acquired the interests conveyed to them by Gates's and McBrown's deeds by

different and distinct transactions between them and their grantors, who were with them at the time of the transactions tenants in common in the ranch, and parties to an action for its partition. The conveyances in which the transactions resulted changed the extent of the interests which each of the grantors and grantees named in the deeds had in the ranch at the commencement of the action, but they wrought no change in the legal relations of the parties to the action. The parties still remained tenants in common and actors in the action of partition, representing in their own rights the interests which they claimed to be still vested in them. On the trial of the action, those interests were ascertained and determined, set apart and allotted to them respectively; and the judgment rendered is conclusive and binding upon each as to the extent and allotment of his interest. No one of the parties to the judgment is entitled to a right to the land allotted to another, or to control the legal title to it, except as he may derive such a right from some conveyance of the title or agreement for the transfer of the title by way of sale or in trust, executed by him or those to whom the allotment has been made.

As to the land allotted to Gates, McBrown does not *personally* claim any right derived from any deed or agreement in writing executed by Gates, nor by any personal transaction between Gates and himself. His only claim is founded upon the instrument in writing which was executed and delivered to him by the defendants on the 14th of October, 1865, simultaneously with the execution and delivery of his deed to them.

But Gates's interest in the ranch did not form any part of the subject-matter of that instrument; the instrument had reference only to a portion of the ranch described as reserved for the allotment of McBrown's undivided interest in the ranch. Gates was no party to the instrument; the only parties to it were McBrown and the defendants.

Besides, the instrument does not contain words of trust or of contract for the sale or transfer of the title to the tract of land described in the instrument as reserved. The words in it express a mere promise by the defendants to use their influence to have McBrown's interest in the ranch allotted to him in that portion of it which he himself in his deed to them reserved for that purpose; and they express the consent of the defendants that that shall be done. But the defendants had no power or authority to ascertain and determine the interests of any tenant in common of the ranch, or to set it apart and allot it for him in any particular portion of the ranch; that could only be done under the law by the officers of the law in the action of partition; and it is not to be supposed that the parties to the instrument intended to attempt to influence the officers as to the extent of McBrown's interest or its allotment. Performance of an agreement for such a purpose could not be compelled by a court of equity. But be that as it may, the words used in the instrument are not words declaratory of a trust or expressive of a contract. No obligation, therefore, springs from the instrument binding the defendants to sell or convey the land to which it refers, or to procure the legal title to it in trust for McBrown; therefore the latter derives from the instrument no equitable right enforceable against the defendants in a court of equity.

The defendants, however, do hold the legal title to the land allotted to Gates. But as holders of that title they cannot be compelled to transfer it to McBrown, except upon the ground that they hold it in trust for him personally, or upon some agreement by them, founded upon an adequate consideration, for the transmission to him of the title. It is not claimed that they acquired or that they hold the legal title to the land in trust for him individually.

They did, as the executive committee of the Land League, purchase from Gates, and also from McBrown,

and acquired their titles, but they do not hold the titles thus acquired in trust for either McBrown or Gates. Both acquisitions were paid for with funds raised for that purpose by assessments levied upon the original interests in the ranch of the members of the league; and according to the provisions of the league agreement, the members who paid their assessments were entitled to share in the purchases in proportion to the amount of assessments levied and paid by them respectively; the defendants therefore hold the titles which they acquired from Gates and McBrown in trust for the members of the Bojorquez League.

The league agreement declares the purposes of the trust, and the powers and duties of the defendants as trustees in relation to the trust, and by it the rights of beneficiaries in the trust must be ascertained and determined. If, as a member of the league, McBrown has complied with the terms of the agreement under which the defendants purchased, there can be no question that he would be entitled with the other beneficiaries to share in the trust property, and to enforce the trust; but that must be done in a proper case, to which all the beneficiaries are parties, so that the rights of all may be settled and adjudged. (*Gates v. Lane*, 44 Cal. 392; *Bettis v. Townsend*, 61 Cal. 333.) McBrown's single interest as a member of the league cannot be tried and determined in a collateral way in an action founded upon a separate and distinct instrument in writing to which the other beneficiaries were not parties.

We find no reversible error in the proceedings.

Judgment and order affirmed.

MCKINSTRY, J., MYRICK, J., and SHARPSTEIN, J., concurred.

THORNTON, J., dissented.

Rehearing denied.

[No. 20110. In Bank.—June 29, 1886.]

THE PEOPLE, RESPONDENT, *v.* PETER MARSEILER,
APPELLANT.

CRIMINAL LAW — ASSAULT WITH INTENT TO MURDER — INFORMATION. — An information for an assault with intent to murder is sufficient if it substantially complies with the requirements of sections 950-952 of the Penal Code.

ID. — INSTRUCTIONS — REVIEW OF ON APPEAL. — Alleged errors in the instructions to the jury in a criminal case will not be considered on appeal if the instructions are not embodied in the record.

ID. — HEARSAY EVIDENCE — IMMATERIAL ERROR. — The admission in evidence of a statement by the person alleged to have been assaulted, made without the presence of the defendant and about two hours after the assault, to the effect that he was shot, without indicating by whom the shot was fired, is not prejudicial to the defendant if the latter admits when testifying in his own behalf to having fired the shot complained of.

ID. — Error in admitting hearsay evidence of a certain fact is cured if the defendant subsequently testifies to the same effect.

ID. — ASSAULT WITH DEADLY WEAPON — CONDITION OF DEFENDANT AS TO SOBRIETY — EVIDENCE — INTENT. — Where an information charges the defendant with an assault with intent to murder, and he is convicted of an assault with a deadly weapon, the exclusion of evidence tending to show his condition as to sobriety or the contrary at the time of the assault is not error, as the offense of which the defendant was convicted does not involve the necessity of proof of any specific intent to commit it.

ID. — REPUTATION OF DEFENDANT FOR PEACE AND QUIET — REJECTION OF EVIDENCE OF. — On the trial, the defendant's counsel asked a witness if he knew the reputation of the defendant for peace and quietude in the community in which he lived. The district attorney objected to the question because it had not been shown that the witness knew the particular community in which the defendant lived. The court thereupon asked the witness several questions, and then sustained the objection. The record does not show what these questions were, nor whether the witness knew in what community the defendant lived. *Held*, that the objection was properly sustained.

ID. — IMPROPER QUESTION — ANSWER — ERROR WITHOUT PREJUDICE. — The allowance of an improper question to be put to a witness against the objection of the defendant will be considered as without prejudice if the record fails to show that any answer was given to the question.

ID. — EXPERT TESTIMONY AS TO EYESIGHT. — A physician cannot testify as an expert to the relative powers of eyesight of two different persons, under certain named conditions, unless it is first shown that he has made an examination of their eyes.

ID. — ABSENCE OF WITNESS FROM TRIAL — REFUSAL OF BENCH-WARRANT. — On the trial, certain witnesses for the defendant, who had been served with subpoenas out of the county in which the

action was tried, did not appear when called to testify. The defendant thereupon asked for a bench-warrant to enforce their appearance. The court denied the application. It did not appear by affidavit or other sworn statement what was sought to be proved by the witnesses, or that their testimony would have been material to the defendant, or that they were within immediate reach of the process of the court. *Held*, that the action of the court was proper.

APPEAL from a judgment of the Superior Court of Santa Cruz County, and from an order refusing a new trial.

The facts are stated in the opinion.

James A. Hall, for Appellant.

Attorney-General Marshall, for Respondent.

FOOTE, C.—The defendant was by a jury found guilty of an assault with a deadly weapon. He has appealed from the judgment of conviction and an order denying him a new trial.

The demurrer to the information was properly overruled; the latter was in substantial conformity to the requirements of sections 950–952 of the Penal Code, and charged but one offense, an assault with intent to kill and murder.

The alleged imperfections in the charge of the court to the jury cannot be considered here, as in the record before us that charge does not appear.

The defendant complains that the court allowed a witness to testify, against the former's objection, that one Morris, the person alleged to have been assaulted, told the witness about two hours after the alleged shooting that he, Morris, was shot.

The defendant himself, when sworn as a witness, admitted to having fired the shot complained of, for the purpose of scaring Morris, and the statement first referred to did not indicate *who* fired the shot; hence by its admission in evidence the defendant was not prejudiced.

The objection that it was hearsay evidence was made to the statement of E. Dakin that Morris had claimed in his presence, but not in that of the defendant, that a certain gun belonged to the latter. For the reason that the defendant identified that very gun as his own when testifying, the error, if any, was cured.

The court is said to have erred in not permitting Peter Morris to answer a question as to the condition of the defendant as to sobriety or the contrary at the time of the alleged shooting.

As the offense of which the defendant was convicted did not involve the necessity of proof of any specific intent to commit it, evidence as to whether the defendant was drunk or sober at the time of the alleged shooting was immaterial, and the court committed no error in excluding it.

The defendant's counsel propounded to a witness this question:—

“Do you know the reputation of this defendant for peace and quietude in the community in which he lives?”

The district attorney objected to it upon the ground that it had not been shown whether as a matter of fact the witness knew the particular community in which the defendant lived. By the bill of exceptions it appears that the court thereupon asked the witness several questions, and then sustained the objection. What those questions were does not appear in the record, nor does it appear therein that the witness knew what community the defendant lived in.

From which it must be presumed that the court was satisfied the witness did not know the defendant's reputation as asked for in the community in which he lived, and properly sustained the objection of the district attorney.

A question put by the district attorney to one Pratcher, a witness, as follows: “Did you ever get drunk there with him?” was objected to as irrelevant, immaterial, and

not proper cross-examination, but was allowed by the court to be asked.

Since no answer to the question is shown by the record to have been given, it does not appear that the defendant was deprived of any legal right.

The defendant further complains that the court below erred in not permitting a question to be answered asked by his counsel of certain physicians as experts, as follows: —

“ Suppose that on a medium dark night, one man was standing a distance of twenty-five paces from another, that one of the men had lost one eye, would he be as apt to see the movements and what was done by the other man as if he had both eyes in good condition?”

The defendant then offered to prove by those physicians that under the circumstances mentioned in that question the prosecuting witness, a one-eyed man, could not have seen as well as the defendant, who possessed two eyes.

It seems to us that to render such a question or such evidence proper, it ought first to have been shown that those physicians had made an examination of the eyes of Morris and the defendant; for without a knowledge of the structure, condition, and powers of the particular eyes about which they were called upon to give evidence, it is impossible to perceive how they could better have known anything about the relative powers of the two men's eyes under the conditions named than any unprofessional person could have done by simply looking at the two men casually, or as the question was put, without even looking at any two *particular* men, or at any men at all.

The action of the court in not issuing attachments for certain witnesses for the defendant is also assailed as erroneous.

It appears that the two witnesses in question had been duly subpoenaed to appear, but it does not appear but that

the defendant knew they were not present when he went to trial.

After the case for the people was closed, and the defendant had testified, and numerous other witnesses had been sworn and testified in his behalf, the two above referred to were called at the court-room door by the sheriff, and failed to answer. Then a bench-warrant was asked for by the defendant to enforce their appearance.

It did not appear by affidavit or any sworn statement what was sought to be proved by those witnesses or either of them, or that the evidence expected from them was in any particular material to the defense.

The trial of this cause was had in Santa Cruz County; the witnesses were served with the subpoena in Santa Clara County, California. From all which we do not perceive that the court in refusing to grant the attachment for the witnesses abused the discretion vested in it in reference to such matters. There appeared to be no need for their evidence upon the part of the defendant, they are not shown to have been within easy or immediate reach, and for all that the court knew, the trial might have been uselessly prolonged for several days without the witnesses being then forthcoming, or their testimony of any value when had.

The judgment and order should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 11529. Department One.—June 30, 1886.]

JAMES H. SWIFT ET AL., RESPONDENTS, *v.* T. GOODRICH ET AL., APPELLANTS.

RIPARIAN PROPRIETORS — USE OF WATERS OF STREAM — LEASE — ESTOPPEL. — An upper riparian proprietor who enters into an agreement, purporting to be a lease, with a lower proprietor, whereby the latter grants to him for a certain term the right to the use of the waters of the adjoining stream for domestic purposes and irrigation, is not, upon the expiration of the agreement, estopped from asserting his right as a riparian proprietor to the use of the water of the stream.

APPEAL from a judgment of the Superior Court of Santa Barbara County.

The action was brought to restrain the defendants from using or diverting the waters of a certain stream. The plaintiffs recovered judgment as prayed for. The further facts are stated in the opinion of Mr. Justice McKinstry.

R. B. Canfield, for Appellants.

W. C. Stratton, for Respondents.

McKINSTRY, J.—The complaint was demurred to on the ground that it did not state a cause of action.

The complaint avers that the plaintiffs and defendants are riparian proprietors,—the lands of defendants lying above those of the plaintiffs, on Bush Creek. And further avers that on the fourth day of March, 1874, Jarvis Swift (predecessor in interest of plaintiffs) and B. T. Dinsmore (grantor of defendants) executed a certain instrument in words and figures as follows:—

“ This indenture of lease made and entered into this fourth day of March, A. D. 1874, between Jarvis Swift, the party of the first part, and B. T. Dinsmore, the party of the second part, both residents of Montecito, in the county of Santa Barbara, state of California, witnesseth: That the said party of the first part hereby grants to the party of the second part the right and privilege to the

free use of the water of a certain stream running near the house of said Dinsmore, known as Bush Creek, for all the necessary purposes of his house use, and the same to be taken from said stream where it is now taken, and then to be turned back into the stream at a point immediately below where the party of the second part now obtains water for family and house use, and the party of the first part further agrees that the party of the second part shall have the use of the water for irrigation to the same amount now required as often as it shall be necessary, and without waste or injury to the party of the first part, and after the water has been so used, to be turned back again into the stream at the same point hereinbefore mentioned; and the said party of the second part agrees and binds himself to not use the water so taken from said stream for any other purposes than those agreed upon by this lease, and in such a manner as to avoid the least waste, and after using the water for irrigation, to turn it back into the stream at the point above mentioned, and that he will use all reasonable efforts to keep the water confined in the place where said water is to be returned into the stream, and for the privileges hereby granted by this lease, the party of the second part agrees to pay to the party of the first part one dollar per year for the period of ten years; this lease shall be for the term of ten years from this date.

“ JARVIS SWIFT.
“ B. T. DINSMORE.”

That immediately upon the execution of said “lease,” Dinsmore used the water of said creek as therein provided, and he and his successors so used said water during the term in the lease specified.

That the lease expired March 4, 1884, and that defendants have continued ever since to use, and will unless enjoined continue to use, the water “for all necessary house use, at the house mentioned in said lease (on de-

fendant's land), and to use said water upon said land owned by them for the purposes of irrigation," etc.

Unless the defendants are estopped by the written agreement from using the waters for necessary household purposes, or from using the water for irrigation, the complaint states no cause of action. A riparian proprietor may take water from the stream for necessary household purposes, and may make reasonable use of it for purposes of irrigation. (*Lux v. Haggin*, 69 Cal. 255.) There is no averment in the complaint that the upper riparian proprietors have been or are using an unreasonable quantity of water for irrigation purposes, or of facts showing that the quantity used for such purposes has been or is unreasonable.

The position of respondents is, that when the grantor of defendants executed the "lease," he admitted that his only right to the use of the water was that which he acquired under and by virtue of the lease; that the plaintiff's cause of action is founded on the fact that the lease has expired, and that defendants are estopped from claiming any right to the use of the water, and should be compelled to discontinue it.

The question in this case is not what were the respective rights of the parties to the agreement of 1874, or of their successors, while the written agreement was in force, but what were their rights when this action was commenced.

Respondents rely upon the fourth subdivision of section 1962 of the Code of Civil Procedure: "A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation."

The statute relates to existing tenancies. But upon principles of justice and policy, the courts hold that a tenant cannot remain in possession of the land demised after the expiration of his term, and while so in possession, dispute the landlord's title. He is estopped to do so because he entered into and obtained the possession from

the landlord. (Bigelow on Estoppel, 372, 381-384.) After the expiration of the lease, however, he may surrender the possession, and then assert a title hostile to that of the landlord.

A statement of the doctrine shows that it is not applicable to a case like the present. For aught that appears, defendants and their grantors have been in possession of the *land* through which the creek flows since a date antecedent to the execution of the written instrument. They are not called on to surrender the land, or the water on the land, to the plaintiffs, before asserting a right to the reasonable use of the flowing water.

How could defendants surrender to the plaintiffs the use of the water except by ceasing to use it? If this were necessary, a cessation of the use, for however limited a period, would authorize them to assert their right to a renewed use. But to say that a cessation of the use for a day or an hour (by which the plaintiffs would secure no substantial benefit) must precede the assertion by defendants of a right to the use of the water would lead to an absurdity. On the other hand, if the defendants here are forever estopped from claiming any use of the water, they occupy a very different and much less desirable position than any tenant of real property with reference to his former landlord.

But the relation of landlord and tenant, to which the rule as to estoppel is referable, never existed between the parties to the written agreement or between their successors. Though contracts with respect to incorporeal hereditaments may be good as contracts, they do not create the relation of landlord and tenant. (1 Washburn on Real Property, *310.) There may be an enjoyment of the easement, but no possession such as can be made the basis of an action of ejectment. (Taylor's Landlord and Tenant, sec. 699.) The definition of an easement excludes the idea of its being held as a tenancy. (Bingham on Real Property, 17.) No action (of ejectment)

will lie to recover possession of a watercourse. (Angell on Watercourses, sec. 8.) If it be conceded that the parties to the written agreement might be estopped from denying admissions contained in it while it was operative, the defendants were not "tenants" within the meaning of subdivision 4 of section 1962 of the Code of Civil Procedure. Nor are they tenants holding over to whom is applicable the prohibition which precludes such from denying the title under which they entered into possession of corporeal hereditaments until after they have returned the possession to him from whom they received it.

The demurrer to the complaint should have been sustained.

Judgment reversed, and cause remanded.

MORRISON, C. J., concurred.

MYRICK, J., concurring.—It is stated by respondents (plaintiffs) in their brief, that their cause of action is founded upon the fact that the lease has expired, and the defendants should discontinue the use of the water; that there is no issue as to the rights of riparian proprietors, and it is entirely immaterial whether they (plaintiffs) are or are not deprived of the use of the water. Plaintiffs assert that the taking of the lease should estop defendants from making any claim to the use of the water after the expiration of the term leased. I am of opinion that this assertion is not maintainable, and for that reason only I concur in the judgment.

[No. 9069. In Bank.—June 30, 1886.]

J. H. ROBERTS ET AL., APPELLANTS, v. M. J. DONOVAN ET AL., RESPONDENTS.

SURETIES — DISCHARGE FROM LIABILITY — PRINCIPAL AND AGENT.

— The sureties on a bond for the faithful performance of the duties of an agent are released from liability for the subsequent defaults of the agent if the principal and agent, without the knowledge or consent of the sureties, materially alter the terms of the contract of agency, or if the principal continues the agent in his employ after knowledge that he has misappropriated money coming into his hands as agent.

PLEADING — ACTION AGAINST JOINT DEBTORS — COUNTERCLAIM — CAUSE OF ACTION IN FAVOR OF ONE DEFENDANT. — In an action against two or more joint debtors to enforce their joint liability, the summons being served on all of them, one of the defendants cannot set up by way of counterclaim a cause of action existing in his favor alone against the plaintiff.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court, and the opinion of Commissioner Searls.

George D. Shadburne, for Appellants.

E. P. Cole, and *A. N. Drown*, for Respondents.

Ross, J.—As far as it goes, we are satisfied with the opinion delivered when this case was pending in Department, which will therefore stand as the opinion of the court upon the question therein discussed.

But it is proper also to decide whether the sureties upon the bond sued on were released by the conduct of the plaintiffs. The bond, as stated in the opinion already delivered, was executed by defendant Tobin as principal, and defendants Donovan and McGrath as sureties, to the plaintiffs, conditioned for the faithful performance by Tobin of a contract with plaintiffs by which he became their San Francisco agent for the sale on commission of certain brick, in such quantities as plaintiffs might deem it to their interest to furnish.

The agreement, for the faithful performance of which it is alleged the bond was executed, was of date July 29, 1878. Upon the trial in the court below, it was found as a fact "that on the ninth day of April, 1879, without the assent of either of the defendants Donovan or McGrath, the plaintiffs and defendant Tobin entered into a new agreement and contract, by which they modified, varied, altered, and changed the agreement of employment of July 29, 1878, and sued on in the complaint; and the said agreement and contract of the ninth day of April, 1879, was in writing, and was valid and binding on the said plaintiffs and defendant Tobin." The court further found that in December, 1880, an accounting was had between plaintiffs and Tobin, by which it was ascertained that the latter had appropriated to his own use, without the knowledge or consent of plaintiffs, the sum of \$150, which he had collected as their agent, and that plaintiffs, knowing that fact, continued him in their employ, and failed to notify the sureties of the default; and further, that the sureties had no notice thereof until after June 23, 1881.

It was further found that in December, 1880, plaintiffs and defendant Tobin "entered into a new and binding agreement, by which plaintiffs agreed still to employ the said Tobin as their agent for the sale of bricks in the city and county of San Francisco, and to wait on him for the payment of his indebtedness to them until his commissions for the sale of bricks should liquidate the same; he, the said Tobin, agreeing to repay the said indebtedness by allowing plaintiffs to retain and keep back his commissions to an amount sufficient to liquidate the same; and said plaintiffs agreed to wait on said Tobin for the repayment of his said debt for at least one month. That said Tobin before June 23, 1881, had paid to plaintiffs all sums of money he owed them by applying his commissions on the sale of brick thereto. That the said new agreement of December, 1880, was without

the consent or knowledge of either of the defendants, Donovan or McGrath."

These acts on the part of the plaintiffs operated a release of their sureties from liability upon the bond sued on: 1. Because of the alteration of the contract made in April, 1879, without the consent of the sureties (*Victor Sewing Machine Co. v. Scheffler*, 61 Cal. 530); and 2. Because of the continuance by plaintiffs of Tobin in their employ with knowledge of his misappropriation of their funds,—the sureties being ignorant thereof. Where there is a continuing guaranty for the honesty of a servant, if a master discover that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing, continues him in such service without the knowledge or consent of the guarantor, express or implied, he cannot afterward have recourse to the guarantor to make good any loss which may arise from the dishonesty of the servant during the subsequent service. If the dishonesty had existed before the surety became bound, and the master had concealed it, the surety would not have been liable, and the cases are the same in principle. (Brandt on Suretyship, sec. 368.)

The findings are not sufficiently definite to enable us to determine the relative rights of plaintiffs and defendant Tobin.

Judgment and order reversed, and cause remanded for a new trial.

MYRICK, J., SHARPSTEIN, J., and MCKINSTRY, J., concurred.

The following is the opinion of Department One above referred to, rendered on the 28th of December, 1885.

SEARLS, C.—On the twenty-ninth day of July, 1878, plaintiffs and defendant Thomas D. Tobin entered into an agreement in writing, by which Tobin became the agent of plaintiffs in San Francisco for the sale of their

bricks, in such quantities as they might deem it for their interest to furnish, said Tobin to sell on commission, and to charge usual and customary commissions. Tobin was to account to and pay over from time to time to H. L. Miller, agent of plaintiffs, all moneys by him collected on account of bricks sold, etc.

Defendants Donovan and McGrath as sureties, and Tobin as principal, executed to plaintiffs, a joint bond in the sum of ten thousand dollars gold coin, conditioned for the faithful performance by Tobin of his contract with plaintiffs.

This action is brought to recover \$3662.20 on the bond for the failure by Tobin to account and pay over moneys by him averred to have been collected on sales of brick.

Defendant Donovan set up a counterclaim against plaintiffs for four thousand five hundred dollars, claimed as due Tobin on the brick transaction, and by him assigned to Donovan before suit was brought.

The cause was tried by the court, who filed written findings, upon which defendants had judgment for their costs, except defendant Donovan, who had judgment on his counterclaim for \$2216.82, and costs of suit.

The cause is brought here on appeal by plaintiffs from the final judgment and from an order denying a new trial.

The trial of the cause involved an investigation of lengthy and somewhat complicated accounts, and as there was evidence tending to support the result arrived at, we cannot assume to disturb the findings of fact. This being true, the respondent does not need, and the appellants would hardly appreciate, the reasons for the conclusion at which we have arrived as to the facts were we to give them *in extenso*.

The point is made by appellant that the balance claimed to have been due to Tobin, by him assigned to Donovan, and for which judgment was rendered in favor

of the latter, was not a legitimate counterclaim in this action.

A counterclaim, to be available in an action, "must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; 2. In an action arising upon contract; any other cause of action also arising upon contract and existing at the commencement of the action." (Code Civ. Proc., sec. 438.)

It must exist in favor of the defendant and against the plaintiff. (*Chase v. Evoy*, 58 Cal. 348.)

A defendant cannot set up a counterclaim existing in favor of another person.

The test is, whether defendant could have maintained an independent action on the demand. (*Belleau v. Thompson*, 33 Cal. 495.)

A surety cannot set up a counterclaim existing in favor of his principal against the plaintiff (*Gillespie v. Torrance*, 25 N. Y. 306); nor can a counterclaim in favor of a defendant and a stranger to the action be set up (*Hook v. White*, 36 Cal. 299); or a claim against the plaintiff and another person. (*Howard v. Shores*, 20 Cal. 277; *Hobbs v. Duff*, 23 Cal. 627.)

In the present case, Donovan and McGrath were joint obligors upon a bond with Tobin. The latter had a claim against plaintiffs, growing out of transactions under the contract for the faithful performance of which they had become sureties. Tobin assigned his claim to Donovan, one of the sureties, and his right to recover thereon is the precise question presented.

The term "counterclaim" is broader in its scope and meaning than "set-off," and includes not only demands which were the subject of set-off and recoupment, but also

in our state equitable demands. A set-off, prior to the code, could in most of the states only be interposed where the demand was certain, or capable of being made certain by calculation, and could not be sustained for unliquidated damages in a court of law.

The defense of recoupment was one in which the defendant was permitted, in an action upon a contract, to show that, by reason of some failure of the plaintiff on his part to perform his cross-obligations under the contract, defendant had suffered damage, which he was permitted to discount, keep back, cut off, or recoup to the extent of his damage, but not exceeding the demand of plaintiff on the same contract. This defense was allowed at law, usually, but not always, by virtue of some statutory provision; its object being to avoid circuity of action. If a defendant failed to recoup damages where he might do so, he was afterwards precluded from maintaining an action therefor, as he is now by our code for counterclaims arising under subdivision 1 of section 438 of the Code of Civil Procedure. A counterclaim under said subdivision includes a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

It has been held in New York, under a statute precisely like our own, that the term "transaction" is a broader one than "contract." A contract is a transaction, but a transaction is not necessarily a contract. (*Xenia Branch Bank v. Lee*, 7 Abb. Pr. 372.)

We do not, however, deem it necessary to enter upon a discussion of the distinctions between the several cases provided for by subdivisions 1 and 2 of section 438 of the Code of Civil Procedure, for the manifest reason that the counterclaim set up by defendant Donovan must come under one or the other of those provisions; and for the purposes of the decision, it matters not which. If the counterclaim cannot be sustained, it must be for the rea-

son that a several judgment cannot be had between defendant Donovan and plaintiffs.

The action is brought upon the joint bond of all the defendants. Were it a joint and several bond, no difficulty could arise; for where the cause of action is several as well as joint, a several judgment may be entered without reference to the mere form of action.

So, too, when the cause of action is against several defendants jointly, a portion only of whom are served, judgment may be taken against those served, under section 414 of the Code of Civil Procedure, and proceedings may afterward be had in such cases against those not served, under section 989, etc., of the Code of Civil Procedure. And under section 1543 of the Civil Code, the release of a joint debtor does not discharge others.

It is submitted, however, that where all of several joint debtors are sued and served with process, all being equally liable, save in a few exceptional cases, of which this is not one, a several judgment cannot be entered, but the judgment, like the demand, must be joint.

Pomeroy, after discussing at considerable length the several questions arising under counterclaims, at section 761 of his work on Remedies, sums up as follows: "1. When the defendants in an action are joint contractors, and are sued as such, no counterclaim can be made available which consists of a demand in favor of one or some of them; 2. When the defendants in an action are jointly and severally liable, although sued jointly, a counterclaim consisting of a demand in favor of one or some of them may, if otherwise without objection, be interposed."

We think this to be the true rule, applicable to the facts of the present case, and that under it the several demand of Donovan was not a proper counterclaim in the action against him and his co-defendants upon a joint demand against them all.

Springer v. Dwyer, 50 N. Y. 19, cited by counsel for

respondent, is not in conflict with the rule as stated. That was an action for a promissory note against the maker and indorsers, who were severally liable to plaintiff.

People v. Cram, 8 How. Pr. 151, was a case of joint and several liability.

Persons v. Nash, 8 How. Pr. 455, was also a case of joint and several liability, and it was expressly held that where there was a several liability, a defendant severally liable could avail himself of a set-off in his favor.

We know of no well-considered case in which it has been held that one of two or more defendants jointly, and not jointly and severally, liable, has been permitted to set up a counterclaim due to him only.

It sometimes occurs that the very facts constituting a counterclaim may be and are a defense to the action to the extent of defeating the plaintiff's right to recover. In such cases and for such purposes the doctrine we have advanced, so far as the defense is concerned, has no application.

It follows that the objection to the counterclaim interposed in the court below should have been sustained, and that the judgment and order denying a new trial should be reversed and cause remanded.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

[No. 20174. In Bank.—June 30, 1886.]

THE PEOPLE, RESPONDENT, *v.* WINFIELD DONALDSON, APPELLANT.

CRIMINAL LAW — OBTAINING PROPERTY UNDER FALSE PRETENSES — INFORMATION. — An information for obtaining money under false pretenses is sufficient if it charges the offense substantially in the language of the Penal Code defining it.

Id. — BANK CHECK — FALSE TOKEN — WANT OF FUNDS TO MEET CHECK. — In a prosecution for obtaining property under false pretenses, a bank check drawn by the defendant in favor of the person alleged to have been defrauded, and in payment of the property obtained, is a false token within the meaning of section 1110 of the Penal Code, if the defendant knew when he gave the check that he had neither funds to meet it nor credit at the bank upon which it was drawn.

Id. — EVIDENCE — INSTRUCTION. — Where the evidence discloses that the property was obtained through the instrumentality of such a false token, the refusal to instruct the jury to acquit unless they found that the defendant told the owner of the property that he had the money in bank, and that the owner was induced to part with the property by reason of that representation, is not error.

Id. — DELIVERY OF PROPERTY — VESTING OF TITLE — QUESTION FOR JURY — CONFLICT OF EVIDENCE. — In such a case, the question whether or not the property was delivered and title thereto vested in the defendant before the giving of the check is for the jury, and its finding thereon will not be disturbed when the evidence is conflicting.

Id. — EVIDENCE FAVORABLE TO DEFENDANT. — A defendant cannot object to the introduction of evidence if its only effect was favorable to him.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order refusing a new trial.

The information charged the defendant with the offense of obtaining property under false pretenses, in that he did willfully, unlawfully, knowingly, and designedly obtain from one J. P. Spence certain hogs belonging to him and in his possession, by falsely pretending to Spence that he, the defendant, had in the Commercial and Savings Bank of San José the sum of \$196.70, and did, with intent to cheat and defraud said Spence, make, execute, sign, and deliver to him a check upon that bank for such amount. The information further alleged that

Spence was induced to part with his property by reason of such representation, and that the defendant knew at the time that he had no money or credit in the bank, and had no reason to believe that the check would be honored or paid. The further facts are stated in the opinion.

J. M. Lucas, for Appellant.

Attorney-General Marshall, and *Howell C. Moore*, for Respondent.

FOOTE, C.—The defendant was found guilty by a jury of having obtained certain property from one Spence under false pretenses, with intent to cheat and defraud him.

From the judgment of conviction and an order refusing a new trial appeals are taken. His first contention is, that the information filed against him was insufficient, and that the court erred in overruling the demurrer filed thereto.

Upon examination, we are satisfied that the court was right in its ruling in that matter.

The information charged the offense in proper language sufficient to meet the requirements of sections 532, 950, 951, and 952 of the Penal Code. The charge of the learned judge, giving to it an unstrained interpretation, was, we think, in all respects in accordance with law, and was especially full and fair toward the defendant.

The refusal to give certain instructions asked by the defendant is assigned as error also. They were as follows:—

“Before you can convict, you must find as a fact in this case that before the sale and delivery of the hogs in question, the defendant represented to Mr. Spence that he had at that time in the Commercial and Savings Bank of San José the sum of \$196.70, and that Mr. Spence relied solely on such representation in parting with said

hogs; in other words, that he would not have parted with said hogs or delivered them to the defendant unless the defendant had told him that he had such money in bank, and that that representation induced Mr. Spence to part with said hogs; if you do not so find, you must acquit the defendant."

"A bank check is not a false token within the statute."

It is very clear that if the court had given the first of these instructions, the jury would have been compelled to exclude from consideration all that was said or done in the transaction tending to prove the defendant's guilt, and would have been obliged to acquit him unless it had appeared that the defendant had said to Mr. Spence when he handed him the check, "I have the money that check calls for in the Commercial and Savings Bank of San José." Such a misleading instruction, utterly discarding all the evidence pertinent to the issue, was very properly refused.

A bank check may be a false token, and would be such under the statute, if the drawer knew when he gave it, payable to a person other than himself, that he had neither funds to meet it nor credit at the bank upon which he drew it. (Penal Code, sec. 532; *Commonwealth v. Drew*, 19 Pick. 186; *Rex v. Jackson*, 3 Coop. 370; Roscoe's Crim. Ev., 2d ed., 419.)

There was evidence given on the trial of the cause which tended to show that the defendant did not have the money to meet the alleged fraudulent check, or credit at the bank upon which he drew it which would warrant any belief on his part that it would be paid.

The court could not rightfully have taken such evidence from the jury, and therefore did not give the second instruction above referred to.

The bank check for \$196.70 in writing, together with the other evidence in the cause, was sufficient under section 1110 of the Penal Code, which requires that "upon a trial for having, with an intent to cheat and defraud

another designedly by any false pretense, obtained from any person any money, personal property, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token in writing," etc.

The defendant further complains that, according to the evidence in the case, he was not shown to have been guilty of any offense known to the law; for he claims that the things which he was charged to have obtained from one Spence by false pretenses were actually purchased by him from Spence, and title thereto vested in him, and a delivery had before the giving of his check. This was a question for the jury; they have determined it against the defendant, and we cannot say their verdict was wrong, the evidence being somewhat conflicting.

It is also objected to that the court allowed a certain check for the sum of \$150 to be introduced in evidence.

Of that the defendant cannot be heard to complain, for the reason that its only effect, if any it had, was favorable to him, for the jury might have been led by that means to believe in his good faith in the original transaction, as at the time of the giving of the last check he was shown to have paid some cash to Mr. Spence on the first check (the giving of which was alleged to have been fraudulent), and to have given that for \$150 in lieu of the balance due upon the first.

We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 20164. In Bank.—June 30, 1886.]

THE PEOPLE, RESPONDENT, *v.* GEORGE N. WEBB,
APPELLANT.

CRIMINAL LAW — IMPEACHMENT OF WITNESS — CROSS-EXAMINATION — MATTERS COLLATERAL TO ISSUE. — On the trial of a criminal case, where a witness for the defendant, after he had been examined and cross-examined, is recalled by the prosecution for further cross-examination, in order to lay a foundation for his impeachment, the answers of the witness given on his further cross-examination, concerning matters collateral to the issues, are binding on the prosecution, and as to them he cannot be contradicted.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The defendant was convicted of the crime of perjury, alleged to have been committed in falsely swearing to a petition for a writ of *habeas corpus*, to the effect that he knew of his own knowledge that one Margaret Dix was unlawfully imprisoned and restrained of her liberty at the Magdalen Asylum, in the city and county of San Francisco, by the person having charge thereof, whereas, he did not know such fact, or that Margaret Dix was unlawfully or otherwise imprisoned or restrained by any one or at any place. On the trial, after the prosecution and defense had closed their case, the court permitted the prosecution to recall one B. F. Napthaly, a witness for the defendant, for further cross-examination. On such cross-examination, the witness, after testifying that he presented the petition for the writ to D. J. Murphy, the judge of the Superior Court who issued it, was asked by the prosecution whether at that time he stated to Judge Murphy that he would not be responsible for the writ, that he knew nothing about it, and did not like the appearance of the petitioner. The witness denied having made such statements. The prosecution, against the objection and exception of the defendant, then called Judge Murphy, who contradicted the witness in this re-

gard. The further facts are stated in the opinion of the court.

John D. Whaley, for Appellant.

Attorney-General Marshall, for Respondent.

The COURT.—On the trial of this case, after the prosecution had announced that the case was closed, the court permitted the district attorney to recall a witness for the defendant, who had been examined and cross-examined, for further cross-examination, in order to lay a foundation for impeaching him. On the cross-examination for that purpose, the witness was asked questions, which were answered without objections. But the subject-matter of the cross-examination was collateral, and not relative to the issues being tried, and the prosecution was bound by the answers of the witness; as to them he could not be contradicted. It was therefore error to allow, against the objections and exceptions of the defendant, the testimony offered and given to contradict the witness. (*People v. Devine*, 44 Cal. 452; *People v. Furtado*, 57 Cal. 345.)

Judgment and order reversed, and cause remanded for a new trial.

[No. 9382. Department One.—July 12, 1886.]

J. N. PAGE ET AL., APPELLANTS, v. G. M. SUMMERS ET AL., RESPONDENTS.

LOCATION OF MINING CLAIMS — AGREEMENT FOR — RIGHTS OF PARTIES AFTER DISSOLUTION — TRUST. — Where an agreement providing for the prospecting and location of mining claims for the benefit of all the parties thereto is dissolved by mutual consent, neither of the parties is under any obligation to the others to perfect locations commenced in pursuance of the agreement; and subsequent locations covering the same ground made by some of them are not held in trust for the others.

APPEAL from a judgment of the Superior Court of Mono County, and from an order refusing a new trial.

On the 15th of April, 1881, the plaintiffs and the

defendant Young entered into a contract for the purpose of prospecting for and locating mines in the Patterson Mining District in Mono County, California. The contract remained in force until the 12th of May, 1881, when it was terminated by mutual consent. Immediately after the execution of the contract, Frost and Young, two of the parties thereto, discovered a mineral vein in the mining district, and on or about the 27th of April, 1881, located a claim thereon known as the "Kentuck." The notice of location named the plaintiff Page and the defendant Young as the locators. On the 5th of May, 1881, they located another claim on the vein, the notice of location of which named Page, Frost, and another of the prospecting party as the locators. From the 27th of April, 1881, to the 19th of May, 1881, Frost and Young worked continuously upon the latter claim. On the 14th of May, 1881, while Frost and Young were at work upon the Kentuck claim, they tore down the notice of location of April 27, 1881, and substituted another notice, claiming the same ground, signed by G. M. Summers and Matt. Young as locators, and designating the claim as the "May Bell." On the 19th of May, 1881, they tore down the notice of location of May 5, 1881, and substituted another therefor, signed by J. N. Summers and Frost as locators, and designated the claim as the "Georgie Howell." The action was brought to determine the rights of the parties in the several locations, and to compel conveyances in accordance therewith. The complaint alleged that the defendants G. M. and J. N. Summers had notice of the prospecting agreement, and of the work done thereunder. The defendants claimed title under the "May Bell" and "Georgie Howell" locations. Judgment was rendered in favor of the defendants. The further facts are stated in the opinion of the court.

Stewart & Herrin, H. L. Gear, Robert M. Clarke, and J. A. McQuaid, for Appellants.

Bennett & Reddy, for Respondents.

MCKINSTRY, J.—The court below found "that on the twelfth day of May, 1881, the said J. H. Page withdrew from the said prospecting company, and the said prospecting company was dissolved, and the said prospecting agreement was terminated between all the parties thereto."

It is insisted by counsel for appellants that the parties to the prospecting contract were *partners*, or at least occupied a fiduciary relation toward each other like that existing between partners. That it was the duty of Frost and Young to complete the defective locations commenced before the dissolution; and that the subsequent locations made by Frost and Young should be treated precisely as if they were the completion of their prior attempted locations. That neither Frost nor Young could get rid of his obligation to complete the original locations by removing the original notices and posting others, and marking the boundaries of the claims asserted in the notices last posted. Further, that G. M. and J. N. Summers, who took with notice of the prospecting agreement, should be held as trustees.

Where a partnership has contracted engagements which cannot be fulfilled during the time limited for its existence, the partnership continues for the purpose of performing such outstanding engagements, and of taking and settling all accounts, and converting the property, means, and assets of the partnership existing at the time of its dissolution, and for these purposes, the authority of each member of the firm remains the same after as before the dissolution. (*Robbins v. Fuller*, 24 N. Y. 570; *Murray v. Mumford*, 6 Cow. 441; *Western Co. v. Walker*, 2 Iowa, 504.)

The interest of the parties herein in the completion of the defective locations ought not to be estimated by reference to events which happened after the termination of the agreement, even if it appeared that the rights acquired by the subsequent locations were valuable. The

agreement was made in Mono County, the mines located were within that county, and for aught that appears, all the parties to the agreement resided there. There is no finding of the concealment of any fact from the plaintiffs. It must be presumed that, with full knowledge of the existing conditions, all parties to the agreement terminated it, and dissolved the contractual relations arising from it. Page, Fulmore, and Blake may have concluded that the ground was valueless, or that it would be fruitless to complete the locations, or to expend money in developing them. Whatever motive may have influenced them, they saw fit to dissolve the company and end the agreement and enterprise. It may be conceded that the parties to the prospecting contract might, had they deemed it for their interest to do so, have completed the locations previously commenced within a reasonable time, and that they would have been protected during such reasonable time from the interference of third persons. But it was for them to determine whether it was advisable to complete the locations or abandon them.

None of them had contracted an obligation with the government or with any third person to be performed after May 12, 1881. No duty remained with any of them to acquire property not contracted for prior to the dissolution; they had acquired no inchoate interest in property which they were under obligation to complete notwithstanding the dissolution. The plaintiffs (other than Frost) could not have been compelled to take a conveyance of aliquot portions of the ground subsequently located, nor were they liable to the actual locators for part of the cost of making the subsequent locations, nor subject to pay any part of the expense for work done under such locations. It may be added: the court below found that Frost and Young removed and destroyed the original notices. It does not appear but this was done *after* the dissolution of the agreement;

nor does it appear but it was done with the knowledge and consent of the other plaintiffs.

There are reasons, not necessary to mention, why (independent of the termination of the prospecting contract) none of the plaintiffs could demand a decree for a conveyance of any portion of the Georgie Howell,—located by Frost; why Frost is not entitled to any relief; why neither Frost nor Blake could enforce the agreement as against any of the mines located; reasons, also, why in any event the defendants G. M. and J. N. Summers would hold two thirds of the May Bell and one half of the Kentuck free from any trust.

Judgment and order affirmed.

MYRICK, J., and Ross, J., concurred.

[No. 11444. Department One.—July 12, 1886.]

THOMAS McCANTS, APPELLANT, *v.* E. N. BUSH
ET AL., RESPONDENTS.

MECHANIC'S LIEN — SUBCONTRACTOR — LIEN FOR BALANCE DUE — LIABILITY OF OWNER. — Prior to the amendments of March 18, 1885, to the sections of the Code of Civil Procedure regulating the liens of mechanics, a notice by a subcontractor to the owner of a building which is being constructed that a balance is due him on his subcontract from the original contractor does not impose on the owner the duty of retaining a portion of the contract price to satisfy any lien which the subcontractor might subsequently file.

APPEAL from a judgment of the Superior Court of Sacramento County.

In 1884, E. N. Bush, being the owner of certain premises in Sacramento, contracted with Madden and Brennan to erect for him a residence thereon. Madden and Brennan employed plaintiff to do a certain portion of the work included in their contract, and to furnish the materials therefor. Upon the completion of the work, in November, 1884, Bush paid the contract price in full to

Madden and Brennan. On the 16th of October, 1884, the plaintiff served on Bush a notice to the effect that a balance was due him under his subcontract with Madden and Brennan, and on the 6th of December, 1884, filed a claim of lien against the building, for the enforcement of which this action is brought. Judgment was rendered in favor of the defendants.

D. E. Alexander, and Jay R. Brown, for Appellant.

After the service of the notice, it was the duty of the owner of the building to have seen that the plaintiff was paid before paying the original contractors in full. (*Renton v. Conley*, 49 Cal. 188; *McAlpin v. Duncan*, 16 Cal. 127; *Bowen v. Aubrey*, 22 Cal. 571.)

J. F. Ramage, S. Solan Holl, Young & Dunn, W. H. Beatty, S. C. Denson, and Matt. F. Johnson, for Respondents.

The authorities cited by appellant were based upon the statute of 1862, which did not provide for the filing of a lien by a subcontractor, but permitted him to file a notice with the owner. The remedy of the subcontractor is now different. (Code Civ. Proc. secs. 1183, 1185, 1187.)

McKINSTRY, J. — The facts on which the plaintiff sought to recover in this action all occurred before the amendments to the chapter of the Code of Civil Procedure treating of the "Liens of Mechanics," which were adopted March 18, 1885.

We agree with the court below that as the law then stood the service of the notice of the 16th of October, 1884, set forth in complaint, did not affect the rights of the parties, nor impose on defendant Bush the duty of retaining a portion of the contract price to satisfy any lien which the plaintiff might subsequently file.

Judgment affirmed.

MYRICK, J., and Ross, J., concurred.

[No. 11163. Department One.—July 12, 1886.]

P. W. HAYS, APPELLANT, *v.* F. W. EWING, RESPONDENT.

ATTORNEY — NEGLIGENCE — ACTION TO RECOVER FOR — STATUTE OF LIMITATIONS. — Under section 339 of the Code of Civil Procedure, a cause of action against an attorney for neglect of duty in the management of an action is barred at the expiration of two years after the neglect occurred.

Id. — OMISSION TO TAKE USELESS APPEAL. — It is not a neglect of duty for an attorney to omit to take an appeal on behalf of his client from a judgment rendered against him, if such appeal could not have availed the client.

APPEAL from a judgment of the Superior Court of Modoc County.

The action in which the negligence of the defendant is alleged to have occurred was founded on a promissory note, executed on December 1, 1870, and payable one day after date. The action was commenced July 8, 1881. The answer set up the statute of limitations as a defense. On the trial, the court sustained the defense and dismissed the action. During the interval between the years 1870 and 1881, the defendants in the action were absent from the state, except for about one year. The complaint in the present action alleged that the negligence of the defendant consisted in his failure to plead such absence in order to remove the apparent bar of the statute, or to prove that fact on the trial, and in his omission take an appeal from the judgment. The defendant demurred to the complaint on the ground that the action was barred by the statute of limitations. The demurrer was sustained, and judgment rendered for the defendant. The further facts are stated in the opinion of the court.

E. V. Spencer, for Appellant.

*Matt. F. Johnson, C. L. Clafin, and F. W. Ewing,
for Respondent.*

MCKINSTRY, J.—This action is against an attorney at law for neglect of duty in the management of a certain action brought by the present plaintiff against Cogswell *et al.* The defendant demurred generally, and also on the special ground that the complaint shows that the statutory limitation has run against the alleged cause of action.

The judgment for defendant in *Hayes v. Cogswell* was made November 19, 1881. This action was commenced June 16, 1884, and so far as it is based on any neglect of the defendant prior to the judgment of November, 1881, was barred by section 339 of the Code of Civil Procedure.

The complaint herein avers that the plaintiff, subsequent to and within one year after the judgment in *Hayes v. Cogswell*, demanded of the defendant herein that he should take an appeal on behalf of the plaintiff in that action.

But the facts stated in this complaint show that an appeal would have been of no avail.

Judgment affirmed.

MYRICK, J., and ROSS, J., concurred.

[No. 11302. Department One.—July 12, 1886.]

RED JACKET TRIBE NO. 28, IMPROVED ORDER OF RED MEN, OF THE STATE OF CALIFORNIA, RESPONDENT. *v.* JAMES A. GIBSON ET AL., APPELLANTS.

EQUITY — ACTION TO ANNUL CONVEYANCE — FRAUD — EVIDENCE. — In an action by the purchaser to set aside a conveyance on the ground of fraud, a witness for the plaintiff was asked on cross-examination whether he knew of any unfair act done by the defendant to induce the sale. Held, that the question was improper.

ID.—RETURN OF PURCHASE-MONEY — SATISFACTION OF MORTGAGE — REVIVAL OF LIEN. — In such an action, the plaintiff is entitled to a return of the purchase-money on obtaining a decree annulling the conveyance; and it appearing that a portion of the purchase-money had been used by one of the defendants to satisfy a mortgage held by a third person on certain other land belonging to him,

Held, that the plaintiff was entitled to have the lien of the mortgage revived in its favor.

BENEVOLENT ASSOCIATION — BY-LAWS — POWER OF TRUSTEES TO INVEST MONEY. — A member of a benevolent association, who is acquainted with its by-laws, is chargeable with notice of the restrictions thereby imposed upon the power of the trustees to invest the funds of the association.

PRACTICE — EVIDENCE. — On the trial, certain evidence stated in the opinion was admitted against the objection of the defendants, and certain objections to questions asked by him on cross-examination were sustained. *Held*, that the rulings of the court were proper.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The plaintiff is a corporation formed for fraternal and charitable purposes. The defendant the Occidental Building and Loan Association is also a corporation, formed for the purposes indicated by its name. In November, 1884, the defendants Gibson and Bennett were members and officers of the plaintiff, and together with the defendant Dustman and one Worthington composed its board of trustees. At that time Gibson was the owner of certain blocks in the city of Sacramento, on which the Occidental Building and Loan Association held a mortgage to secure the payment of his note for twelve hundred dollars. The plaintiff had then on deposit in bank about two thousand dollars, subject to the order of its trustees. The defendant Gibson, desiring to get that money, entered into an arrangement with Bennett whereby Gibson was to deed a portion of said lots to the plaintiff, and Bennett was with Gibson to induce the other trustees to unite in drawing the money from the bank and paying eighteen hundred dollars thereof to Gibson as the ostensible purchase price of the land. Bennett and Gibson induced Dustman to consent to this arrangement, and the transaction was consummated by them, without the knowledge or consent of Worthington, and without any meeting of the trustees

being held to consider the matter. In pursuance of this arrangement, the money was drawn from the bank; the mortgage to the Occidental Building and Loan Association was paid off with part of it, and the balance delivered to the defendant Gibson, who thereupon deeded the land to the plaintiff. Upon the first meeting of the plaintiff, the pretended purchase was repudiated by it. The wife of Gibson thereupon filed a declaration of homestead upon the part of the land which had been included in the mortgage to the Occidental Building and Loan Association, but not conveyed to the plaintiff. One of the by-laws of the plaintiff provided that the trustees should "keep the funds invested for the best interest of the tribe, in such stocks, bonds, mortgages, or other securities as shall be approved by two thirds of the members thereof present at a regular council." On the 31st of October, 1884, the council had instructed the trustees to invest two thousand dollars of the money in bank. The action was brought to have the deed to the plaintiff declared void, and to revive the mortgage for its benefit, and for a personal judgment against Bennett, Dustman, and Gibson. Judgment for the relief prayed for was rendered in favor of the plaintiff. The further facts are stated in the opinion of the court.

Young & Dunn, for Appellants.

Freeman, Johnson & Bates, for Respondent.

McKINSTRY, J.—There was sufficient evidence to justify the findings of the court below.

Evidence that the defendant Bennett acted without the concurrence of his co-trustee Dustman, or that the latter was induced to concur by reason of misrepresentations made by the former with respect to Worthington's concurrence, was admissible.

Evidence that Dustman understood the propriety of the purchase was to be submitted to the "tribe" was admissible.

The objection to the question asked on cross-examination of the witness Dustman, "Now, then, do you know of any unfair act that he (Gibson) did to induce the sale?" was properly sustained, because calling for the inference of the witness. The witness had already stated on his cross-examination what Gibson had said and done to induce the purchase. He had also been asked, "Did Gibson do anything that you know of to induce you to purchase that lot and a half other than what you have testified to?" To this question the witness had answered, "Not that I know of." Whether the acts of Gibson were "unfair" was to be determined by the jury.

The court was authorized to revive the lien of the mortgage of the Occidental Loan Association in favor of the plaintiff if the satisfaction of the mortgage was part of the fraud practiced on the plaintiff.

The court below properly admitted evidence that the trustees never assembled and as a board considered the transaction, — the purchase from Gibson.

The prompt disavowal of the act of one of the trustees was a fact which the plaintiff was entitled to prove. Gibson was a member of the tribe, and acquainted with the by-laws, which did not authorize the trustees to invest in lands. The order instructing the trustees "to try and invest the money in the bank, not exceeding two thousand dollars," does not purport to authorize an investment of money of the tribe otherwise than "in stocks, bonds, mortgages, or other securities, approved by two thirds of the members thereof present at regular council." Moreover, the by-laws of plaintiff could not be amended by a simple motion or resolution.

The decree of the court below annulled the deed from Gibson to the plaintiff, and did not provide for a reconveyance from the latter to the former. This on the theory that the transaction was fraudulent, and in equity the deed conveyed no title. The deed being annulled, the plaintiff was entitled to a return of the money or its equivalent.

The minutes of the proceedings of the tribe showing a disavowal of the transaction were admissible, notwithstanding the objection that "there was no allegation in the complaint of a tender of reconveyance." The complaint did not pray for a reconveyance, and none was ordered.

Judgment and order affirmed.

MYRICK, J., and Ross, J., concurred.

[No. 11094. Department One.—July 13, 1886.]

IN THE MATTER OF W. H. RUSSELL, AN INSOLVENT.

INSOLVENCY — PETITION FOR INVOLUNTARY — PARTNERSHIPS AS PETITIONERS — NAMES OF MEMBERS. — Under section 8 of the insolvent act of April 16, 1880, a petition in involuntary insolvency which describes the petitioning creditors as firms or copartnerships is sufficient, although the names of the persons comprising the firms are not given.

ID. — FACTS SHOWING INDEBTEDNESS MUST BE ALLEGED. — In such a proceeding, the petition should allege the facts showing the indebtedness of the respondent to at least five of the petitioners, with the same degree of certainty and fullness as would be requisite in a complaint in an ordinary action to recover the indebtedness.

APPEAL from a judgment of the Superior Court of Sacramento County.

The proceeding was instituted on January 9, 1885, by certain individuals and firms, alleged creditors of W. H. Russell, to have him adjudged an insolvent debtor. The petition averred that Russell was indebted to each of the petitioners in a stated sum of money, but did not allege how or when the respective indebtedness occurred, or that they had not been paid, nor did it state the names of the individuals composing the firms. Russell demurred to the petition. The demurrer was sustained, and the petitioners declining to amend, judgment was rendered dismissing the petition. The further facts are stated in the opinion of the court.

Robert T. Devlin, R. M. Clarken, and John W. Armstrong, for Appellants.

The general averment that the petitioners are creditors, or that the respondent is indebted to them, is sufficient to show that they had a right to file the petition, particularly in the absence of a special demurrer. (*Halleck v. Mixer*, 16 Cal. 577; *Drais v. Hogan*, 50 Cal. 125.) An allegation of the names of the members of the petitioning firms is not necessary. (*Campbell v. Judd*, 7 West Coast Rep. 372.)

Freeman, Johnson & Bates, for Respondent.

The petition is insufficient in not alleging that the sums remain unpaid. (*Frisch v. Caler*, 21 Cal. 71.) The statement that the respondent is indebted to the petitioners is an averment of a mere legal conclusion. (*Lightner v. Menzell*, 35 Cal. 452; *Curtis v. Richards*, 9 Cal. 33; *Wells v. McPike*, 21 Cal. 215.)

McKINSTRY, J. — In *Campbell v. Judd*, 7 West Coast Rep. 372, it was held that a petition of creditors under section 8 of the insolvent law of April 16, 1880, when the alleged creditors are described therein as firms or co-partnerships, and the names of the persons comprising the firms are not given, "complies with the requirements of the statute, and is sufficient."

Respondent herein contends that the petition is insufficient and subject to general demurrer in that it does not show that the petitioners have each a cause of action against respondent. The averment is, that "W. H. Russell is indebted to your petitioners as follows: To A. A. Van Voorhies & Co. in the sum of \$721.75," etc.

In *Campbell v. Judd, supra*, the averment was, that the alleged insolvents were "indebted to the petitioners as follows: To Wilcox, Powers & Co., in the sum of \$346, for goods delivered to them during the year 1883," etc.

It is said by appellants (petitioners) that the debts due

petitioners must be proved like debts due other persons (Stats. 1880, sec. 37, p. 91); and that the statement in the petition that petitioners are creditors is merely by way of inducement to the matter which constitutes the *gravamen* of the petition, the statement of the respondent's acts of insolvency. But a person can be adjudicated an "involuntary insolvent" only on the petition of five or more *creditors*. What would be the result if, without proof of the claims of the petitioners, the respondent should be adjudicated an insolvent, and some or all of the five petitioners should subsequently fail to prove that they were creditors? It seems clear that the petition should show that at least five of the petitioners were creditors, and that respondent should have an opportunity to deny and contest their respective claims prior to an adjudication of insolvency. And if so, it is equally clear that the respondent should have notice of the facts on which the claims of indebtedness are based, or that the facts showing indebtedness should be stated with the same degree of certainty and fullness as in a complaint in an ordinary action to recover the indebtedness. The insolvent act (sec. 11) provides that the alleged debtor may demur to the petition for the same causes as is provided for demurrer in other cases by the Code of Civil Procedure.

Judgment affirmed.

MYRICK, J., and Ross, J., concurred.

Hearing in Bank denied.

[No. 9036. Department Two.—July 13, 1886.]

JAMES M. THOMPSON, APPELLANT, *v.* GEORGE W. WHITE, RESPONDENT.

SLANDER OF TITLE — PRIOR ACTION TO DETERMINE TITLE — NON-SUIT. — In an action to recover damages for slander of title, the defendant is entitled to a nonsuit, if the evidence shows that the existence of the title alleged to have been slandered is in dispute in a prior action between the parties brought for the purpose of determining their rights.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion.

D. L. Smoot, for Appellant.

M. A. Wheaton, for Respondent.

FOOTE, C. — This suit was instituted by Thompson for the purpose of obtaining a judgment for twenty thousand dollars damages against White, for slander of the former's title to an ore-roasting furnace, and for an injunction prohibiting him from continuing such slander.

After the evidence in the cause had been submitted to the court, it appeared to be undisputed that Thompson's title to the undivided interest which he claimed in the ore-roasting furnace as against White rested solely upon a decree of the Nineteenth District Court of the city and county of San Francisco, and a commissioner's deed thereunder.

Upon an inspection of the bill of exceptions in the record, it is evident that the action in which the decree ordering the deed to be made was rendered has never been finally disposed of, but is still pending.

The existence of the title itself alleged to have been slandered is yet in dispute between the parties to the original suit, brought for the purpose of determining that very issue.

Therefore, considering the law as laid down in sections 44-48 of the Civil Code, inclusive, and the facts of this case as disclosed by the record, we can perceive no good reason why the defendant should have been precluded from asserting orally or by publication that which he had a right to do, and was in good faith continuing to do, in the original and pending suit, which had for its object the determination of the question of title to the ore-roasting furnace.

To declare that the nonsuit in this case was improvidently granted would be, in effect, to say that where two parties are engaged in litigating the ownership to property which both claim, each could maintain an action for slander of title against the other for asserting orally or by publication his ownership of that which is thus in dispute.

The judgment and order should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

[No. 9348. Department Two.—July 13, 1886.]

J. S. DYER, APPELLANT, *v.* M. BROGAN, RESPONDENT.

STREET ASSESSMENT — ACTION TO ENFORCE — RECORD OF SUPERVISORS — EVIDENCE TO IDENTIFY. — In an action to enforce an alleged street assessment in the city and county of San Francisco, parol evidence is admissible to show that a certain document, offered by the plaintiff as the record of the board of supervisors ordering the work upon which the assessment was founded to be done, was not in fact a record of the board, and that the true record did not authorize the work.

Id. — FINDINGS — OMISSION OF WHEN IMMATERIAL. — Where a finding made is conclusive against the right of the plaintiff to recover, findings upon other issues are unnecessary to support the judgment against him.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion.

J. M. Wood, and J. C. Bates, for Appellant.

Taylor & Haight, for Respondents.

FOOTE, C.—The plaintiff sued to recover judgment on a street assessment.

The only finding of the court below was: "That the board of supervisors of the city and county of San Francisco did not, on the fourteenth day of November, 1876, or at any other time, adopt or pass any resolution ordering the street work mentioned in the complaint to be done, and that said street work, viz., the grading of Vallejo Street from Larkin to Polk Street, was never ordered by said board to be performed, by resolution or otherwise. And as a conclusion of law, I find that defendant, M. Brogan, is entitled to judgment for his costs, and the clerk is hereby ordered to enter judgment accordingly."

Judgment for the defendant followed in accordance with that finding.

From the former, and the order denying him a new trial, the plaintiff appealed.

The main points urged here by the plaintiff are, that the evidence did not justify the finding, and that parol evidence was improperly admitted to vary the records of the board of supervisors of the city and county of San Francisco.

The principal defense set up by the defendant in his answer was, that said board had never ordered the street work to be done for the cost of which the action against him was being prosecuted.

It appears from the evidence that the record kept by

the clerk of that board from 1867 and continuously up to the time of the alleged ordering of the work in controversy was, for convenience, done by posting into a book the printed slips from the Daily Examiner (a newspaper doing the printing by contract under the street law) of the resolutions of intention, ordering street work, and notices for bids; that the record in reference to the work in hand was made up in that way.

That the resolution under which this work was alleged to have been ordered to be done had several pieces of other work (as printed in it) erased by drawing blue pencil marks through, "and as to work for grading Vallejo Street from Larkin to Polk Street," the blue pencil was drawn through also. That the erasures *were there prior to the board's passing the resolution*, and that the deputy of Mr. Russell, the clerk of the board of supervisors, Mr. Forman, placed the word "stet" opposite the words struck out, as a guide to the printer that he should disregard the striking out of said words, but at what time he did so is not distinctly ascertained.

It appears also that after this time that deputy placed in the record-book, without any authority from the board of supervisors, a printed order which contained the clause stricken out, and was with that exception exactly in the language of the one first placed upon the record.

The plaintiff's contention is, that the proof shows the first order to have been duly made, including the work on Vallejo Street from Polk to Larkin, and that the deputy clerk was only doing his duty when he placed on record a printed slip of the order which contained the words which, *according to Mr. Russell's testimony, had been stricken out before the board made that order.*

Under such a state of facts, we are of opinion that the trial court was justified in believing that said board of supervisors had never ordered the street work to be contracted for or performed, as claimed in the action, and therefore its finding was proper.

When such a finding was made, conclusive as it was against the plaintiff's right of action, findings upon other issues were not necessary.

We perceive no error upon the part of that tribunal in its admission of testimony.

That offered by parol on the part of the defendant was not for the purpose of contradicting *the* record of the board of supervisors; it was for the purpose of showing that which the plaintiff claimed to be that record was not such record, and that *the true* record did not authorize the street work done by the plaintiff. Such testimony was for the purpose of showing which of two that record was, and to uphold it.

It is not admitted that there was but one record; and where two are claimed to exist, one true and the other false, how else upon occasion would it be possible to determine which is the true one, unless the custodian thereof, or other person knowing the facts, may be heard upon his oath to declare which it is?

"A record is conclusive evidence; but what is or is not a record is matter of evidence, and may be proved by other facts, otherwise there would be no remedy."
(*Brier v. Woodbury*, 1 Pick. 363.)

The deputy clerk of the board of supervisors was not clothed with any power to correct a record, even if it had been shown, as it was not, that he made the correction in accordance with the true state of the facts.

And to say that such an officer may of his own motion make such an alteration of a record, and then claim that he cannot be shown to have done so, even although he did it without evil intent, is to place him in the position of being able, through a mistaken opinion of the law and facts in a given matter, to override and nullify the solemn act of a board of supervisors in making an order within its jurisdiction alone.

There is no prejudicial error shown by the record, and the judgment and order should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

[No. 9164. Department Two.—July 13, 1886.]

IN THE MATTER OF THE ESTATE OF GEORGE F. T.
LEARNED, DECEASED. ANNA I. WELCH ET AL.,
APPELLANTS, v. A. C. HEREFORD, RESPONDENT.

ESTATE OF DECEDENT — PROBATE OF WILL — PETITION — ESSENTIAL AVERMENTS. — Under section 1300 of the Code of Civil Procedure, it is not essential that the petition for the probate of a will should state whether it is an olographic or other species of will, nor does any defect of form or in the statement of the jurisdictional facts actually existing invalidate the probate.

ID. — CONTEST ON PROBATE — FINDINGS — OLOGRAPHIC WILL. — Where the probate of a will is contested, and the court by whom the contest is tried finds against the contestants on all the issues raised by them, a further finding that the will is valid as an olographic will, although not necessary to sustain the judgment admitting it to probate as such, is not erroneous, notwithstanding no issue as to its validity as an olographic will was raised by the contest.

ID. — OLOGRAPHIC WILL — EXECUTION BEFORE ADOPTION OF CIVIL CODE — VALIDITY OF. — An olographic will is not invalid because made and executed prior to the time section 1277 of the Civil Code became operative, if the testator did not die until after the section took effect.

PRACTICE — DEPOSITION — EVIDENCE OF NON-RESIDENCE OF WITNESS — WAIVER. — Error in admitting depositions in evidence, without preliminary proof that the witnesses resided out of the county where the cause was being tried, is waived, if the party against whom the depositions were offered dispensed with the formal proof of such fact on the trial, and accepted the verbal statement of the opposing counsel as to their non-residence.

APPEAL from an order of the Superior Court of the city and county of San Francisco admitting a will to probate, from an order revoking letters of administration previously granted, and from an order refusing a new trial.

The proceeding was commenced by the filing of a petition for the probate of a certain will, purporting to have been made and executed by George F. T. Learned on June 3, 1869, and for the issuance of letters testamentary thereon to the petitioner, Mrs. A. C. Hereford, who was named therein as executrix. Certain relatives of the testator contested the probate, alleging that the instrument was a forgery; that the deceased was insane at the time of its execution; that undue influence was used, etc. The court decided all the issues raised by the contest in favor of the petitioner, and further found that the instrument was valid as an olographic will. The contestants moved for a new trial which was denied. The further facts are stated in the opinion.

J. M. Lesser, and A. D. D'Ancona, for Appellants.

Bicknell & White, and Wallace & Hastings, for Respondent.

Foote, C.—This is an appeal from an order admitting to probate the will of G. F. T. Learned, and revoking letters of administration previously granted (upon the supposition that no will then existed) to E. A. Learned; and from that refusing the contestants of the will a new trial upon the issues propounded by them.

The first point of objection raised by the appellants who contested the probate of said will is, that the petition therefor did not propound it as *olographic*, and the contestants did not direct their attack on it as such, and not being advised by the pleadings that the instrument was claimed to be that kind of a will, the court had no right in its findings so to declare it.

In this the appellants are mistaken. In such a proceeding the contestant is plaintiff, the jury are to find upon all the issues of fact raised by the contest, and none others, and if facts are disclosed in evidence which go to the question of the propriety under the law of admit-

ting the will to probate upon grounds which are not put in issue before the jury, the court is then to pass upon such evidence by findings.

In the case now under consideration there was no jury, and the court, in view of all the evidence before it, had a right to determine whether or not the will should be admitted to probate, either as an olographic or other kind of will. (*Estate of Collins*, Myrick's Prob. Rep. 73, 74; Code Civ. Proc., sec. 1312; *Estate of Cartery*, 56 Cal. 470.)

And there is nothing in section 1300 of the Code of Civil Procedure which declares that a petition for the probate of a will shall state whether it is an olographic or other species of will, nor will any "defect of form or in the statement of the jurisdictional facts actually existing make void the probate of a will"; and the evidence in this case sustained the findings.

The court is to admit the will to probate or not, under all the facts shown in evidence, in accordance with the statutes of this state.

But in this case, admitting that tribunal found upon an issue not embraced in the pleadings of the contest, yet it also found against the contestants on all the issues raised by them, and in such a case no finding declaring the will valid as olographic under section 1273 of the Civil Code was necessary in order to sustain the judgment. (*McCourtney v. Fortune*, 57 Cal. 617.)

And the contestants cannot complain of that finding in this instance, because, when the court offered to grant them time to meet the issue as to whether or not the will was valid as an olographic instrument, they declined to take it.

It is also urged that error was committed in admitting the depositions of Mrs. Hereford and Mrs. Dalton in evidence, because, as alleged, it was not shown as a preliminary fact that those persons resided out of the county where the cause was being tried.

But the appellants cannot now be heard to take advantage of such omission, if any there was, because when counsel for the respondent offered himself to be sworn as a witness to prove the fact that those ladies were not residents of the county of the place of trial, and made an oral statement of such facts upon his own knowledge, the former's attorney replied, "I will take your word for it; you need not be sworn."

Of the letters offered in evidence by contestants, one of which was admitted, and the others excluded, the latter were not pertinent to any issue raised by the pleadings, and the action of the court in the premises was proper.

But even had they been admitted, they could have had no possible influence upon the determination of the issues in the contest, or upon the action of the court in admitting the will to probate.

It is also claimed that the will was invalid because made and executed by the testator anterior to the time when section 1277 of the Civil Code became operative. But that person did not die until the statute referred to had gone into effect; hence the point made is without merit. (1 Redfield on Wills, 409, notes 30, 31; *Bishop v. Bishop*, 4 Hill, 139; *De Peyster v. Clendining*, 8 Paige, 295; *Estate of Barker*, Myrick's Prob. Rep. 78, 79.) The orders appealed from should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the orders are affirmed.

Hearing in Bank denied.

[No. 9313. Department Two.—July 13, 1886.]

MICHAEL SCHALLARD, RESPONDENT, *v.* EEL RIVER STEAM NAVIGATION COMPANY, APPELLANT.

CORPORATION — MORTGAGE — EXECUTION OF — AUTHORITY OF OFFICERS — PRESUMPTION. — A mortgage executed in the name of a corporation by its president and secretary, and having the corporate seal attached, is presumed to have been executed in pursuance of a due authorization to such officers, and the burden of proof is on the corporation to show the contrary.

Id. — RESOLUTIONS — PROOF OF EXISTENCE — VALIDITY OF MORTGAGE. — Where the circumstances surrounding the execution of the mortgage show the existence of proper resolutions of authorization, and support the presumption of its authoritative execution, as shown by affixing the corporate seal and the signatures of the proper officers, the mere fact that such resolutions do not appear in the proper book of the corporation is not sufficient to disprove their existence and invalidate the mortgage.

Id. — COUNSEL FEES — RESOLUTION MUST PROVIDE FOR. — In an action for the foreclosure of a mortgage against a corporation, the plaintiff is not entitled to recover counsel fees if the resolution of the corporation authorizing the execution of the mortgage did not provide that the payment of counsel fees should be secured by it.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion.

E. W. McGraw, for Appellant.

Moses G. Cobb, for Respondent.

FOOTE, C. — The defendant is a corporation formed under the laws of this state, and this action was instituted for the purpose of foreclosing two mortgages, aggregating the sum of \$11,941.81, upon the steamer Ferndale, which was constructed by and is the property of the defendant.

Those mortgages and the notes, the payment of which the former were intended to secure, were executed in the name of that corporation by its president and secretary, with the corporate seal affixed. One of the loans of

money was made about one year preceding the commencement of the present action, and the other about fourteen months prior thereto. The money thus obtained was used in the construction of said steamer.

The defense chiefly relied upon is, that the execution of those mortgages was not authorized by the corporation, and that they are invalid as such.

There seems to have been no question but what the money was loaned in the most perfect good faith; that it went toward the building and finishing the steamer of the corporation; that the board of directors of the corporation had lawful power, if exercised at lawful meetings by proper resolutions, to borrow the money and execute the mortgages; and that the corporation received adequate benefit from the transaction.

The contention is, that the meetings of the directors were special in their character, and without proper and legal notice being given to some of the directors who were absent therefrom.

The findings state the fact to be, among other things, that the meetings at which these loans and mortgages were authorized were "adjourned meetings" from regular meetings of said board of directors, and that a majority of said board was present, and that no other notice of said meeting was required by the by-laws of the corporation, except said by-laws stated that regular meetings should be held every three months.

It does not appear that any one of the directors, whether present or absent, objected to the negotiation of the loans or the execution of the mortgages, either at the time it was done or afterwards, which, while it does not affect the question of the legality of their execution, does go far to make it evident that the transaction was a fair one, destitute even of the smallest degree of turpitude. In fact, it seems to be conceded on all sides that the corporation is legally liable for the money in a

proper action, but the defendant contends that the mortgages are invalid.

They have affixed to them the corporate seal, and are proved to be signed by the proper officers. Therefore the latter must be presumed not to have exceeded their authority, and the contrary must be shown by the opposite party. (*Southern California Colony Association v. Bustamente*, 52 Cal. 192-196; Angell and Ames on Corporations, sec. 224.)

And although there is some evidence tending to show that the resolutions of the board of directors, as recited in the mortgage, were not in fact adopted in the exact language as set forth therein, yet there is also evidence which shows the existence of those resolutions of authorization, and the trial court on the whole evidence introduced found that the loans and mortgages were, by legal and proper resolutions of said board, expressly authorized and executed.

And where the facts and circumstances surrounding a transaction of this kind show the existence of proper resolutions of authorization, and support the presumption of the authoritative execution of the mortgages, as shown by the corporate seal being thereto affixed, as well as the proved signatures of the proper officers, we do not entertain the opinion that the fact that such resolutions do not happen to appear in the proper book of the corporation, should be held absolutely to disprove their existence, and make null and void such instruments as those in controversy here, so signed, sealed, and acknowledged. And this we believe to be the law as declared by this court in the case cited, *supra*, and in Angell and Ames on Corporations, sec. 288.

We perceive no error on the part of the trial court in the admission of evidence over defendant's objections. Such evidence was either pertinent to the issues in the cause or it did not and could not have worked any prejudice to the defendant.

There is a cross-appeal here by the plaintiff from that part of the judgment which denies counsel fees to his attorneys, and by stipulation the transcript on the defendant's appeal is to be used on said cross-appeal.

The resolutions authorizing the loans and mortgages did not give authority to have attorneys' fees secured in the latter, and for that reason we think the court below properly declined to allow any.

We are of the opinion, therefore, that the judgment as made and entered and the order denying a new trial should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT.—For reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

[No. 9035. Department Two.—July 13, 1886.]

IN THE MATTER OF THE ESTATE OF GIOVANNI SBARBORO, DECEASED.

ESTATE OF DECEDENT — REVOCATION OF PROBATE — DISMISSAL OF PETITION — APPEAL. — No appeal lies from an order dismissing a petition for the revocation of the probate of a will, or from an order denying a motion of the contestant to set aside and vacate such previous order and all orders and decrees made subsequent thereto.

In. — NOTICE OF HEARING FOR DISTRIBUTION — SUFFICIENCY OF. — The decree of distribution in question was objected to on the ground that the notice required by section 1633 of the Code of Civil Procedure had been improperly given. The notice was in due form, signed by the clerk of the proper court, and posted according to law, and an affidavit of posting made by a qualified person. There was no evidence in the record that the person making the affidavit did not act for the clerk, or that the notice did not remain where posted for the required time. The giving of a proper notice was recited in the decree. *Held*, that the objection could not be sustained.

APPEAL from a decree of the Superior Court of the city and county of San Francisco distributing the estate of a deceased person, and from certain orders made therein.

On the 2d of December, 1878, the will in question was admitted to probate. On the 3d of December, 1879, the contestants filed their petition for a revocation of the probate, which was granted by the Superior Court on the 14th of May, 1880. From this decree an appeal was taken to the Supreme Court. The decree was reversed by that court, and the cause remanded. On the 7th of February, 1883, the *remittitur* was received by the Superior Court, who thereupon ordered that the petition for the revocation of the will be dismissed. This order was made *ex parte*, and without having the case placed on the calendar. On the 26th of February, 1883, the administrator filed his final account, with a petition for distribution, whereupon an order was made fixing the 2d of March following as the day for the settlement thereof, and requiring three days' notice of the hearing to be given by posting. On the following day, one Frank Grimes made and filed an affidavit to the effect that he had on the previous day posted the notice. On the 2d of March, 1883, the court made a decree settling the account and distributing the estate. On the 24th of March, 1883, the appellants made a motion to vacate and set aside the order of the 7th of February, 1883, dismissing their petition for the revocation of the will, and all orders and decrees subsequently made. The court denied the motion. The further facts are stated in the opinion.

A. D. Splivalo, and John Reynolds, for Appellants.

J. M. Burnett, and E. D. Sawyer, for Respondent.

FOOTE, C.—In this case the trial court dismissed a petition for the revocation of the probate of a will, as it

was directed to do by this court in *Estate of Sbarboro*, 63 Cal. 9, and we perceive no error in such action.

And from the order made therein no appeal lies under section 963, subdivision 3, of the Code of Civil Procedure, since such an order is not there mentioned as being appealable.

And the order made denying the motion of contestants of the will to set aside and vacate all the orders and decrees made by the late Probate Court is not made appealable under the section *supra*.

The court, having dismissed the petition heretofore mentioned, proceeded to distribute the estate of the decedent in accordance with his wishes expressed in the will.

The decree made for that purpose the appellants seek to reverse on the ground, as they allege, that the notice required by section 1633 of the Code of Civil Procedure was improperly given. That notice, which is in due form, was signed by the clerk of the proper court, through his deputy; it was posted according to law, as the affidavit of Frank Grimes annexed thereto shows, he being a person qualified by law so to do. There is no evidence in the record that he did not act for said clerk, or that said notice did not remain where posted for the time required by law, and the final decree of distribution contains this recital: "And it appears by proper evidence that the notice as prescribed by law had been given of the hearing of said petition and of the settlement of said final account." All of which is sufficient and conclusive evidence of the fact that the necessary notice was given. (*McClellan v. Downey*, 63 Cal. 520-523.)

The appeals from the orders should be dismissed, and the decree appealed from should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the appeals from the orders are dismissed, and the decree is affirmed.

[No. 11496. Department One.—July 14, 1886.]

PHILIP LOBREE, RESPONDENT, *v.* JOHN MULLAN
ET AL. JOHN MULLAN, APPELLANT.

STATE LAND — RIGHT OF PURCHASE — ACTION TO DETERMINE — DEFENDANT MAY BE SERVED BY PUBLICATION — JURISDICTION. — In an action to determine the right of conflicting claimants to purchase certain state land, brought in pursuance of an order of reference made by the surveyor-general, the Superior Court acquires jurisdiction of the person of a non-resident defendant by the service of summons upon him by publication. By applying to purchase the land, the defendant must be held to consent to this mode of service in advance.

APPEAL from a judgment of the Superior Court of Tulare County.

The action was brought to determine, as between conflicting claimants, the right to purchase from the state certain swamp and overflowed lands situated in Tulare County. The plaintiff, in pursuance of an order of reference made by the surveyor-general, commenced the action against the defendants, and in due time obtained a decree adjudging that the applications of the defendants were void, and that the plaintiff was alone entitled to have his application approved. The defendant Mullan was a non-resident of California, and a judgment by default against him was rendered after a constructive service of summons by publication. From this judgment he appealed. The further facts are stated in the opinion of the court.

Frederick S. Stratton, and C. A. Webb, for Appellant.

The judgment in an action to determine the right of conflicting applicants for the purchase of state lands operates *in personam*, and consequently a judgment by default against a non-resident defendant in such an action is void for want of jurisdiction, if based upon a constructive service of summons by publication. (Freeman on Judgments, sec. 606; *Cunningham v. Shanklin*, 60 Cal.

125; *Cunningham v. Crowley*, 51 Cal. 133; *Hart v. Sansom*, 110 U. S. 153; *Pennoyer v. Neff*, 95 U. S. 714.)

Brown & Daggett, and *Charles G. Lamberson*, for Respondent.

The Superior Court had jurisdiction of the action. (Pol. Code, secs. 3414, 3416; Freeman on Judgments, secs. 606, 607; *Laugenour v. Shanklin*, 57 Cal. 70; *Cunningham v. Shanklin*, 60 Cal. 118.)

MCKINSTRY, J.—Sections 3414, 3415, and 3416 of the Political Code read:—

“3414. When a contest arises concerning the approval of a survey or location before the surveyor-general, or concerning a certificate of purchase or other evidence of title before the register, the officer before whom the contest is made may, when the question involved is as to the survey, or one purely of fact, or whether the land applied for is a part of the swamp or overflowed lands of the state, or whether it is included within a confirmed grant, the lines of which have been run by authority of law, proceed to hear and determine the same; but when in the judgment of the officer a question of law is involved, or when either party demands a trial in the courts of the state, he must make an order referring the contest to the District Court of the county in which the land is situated, and must enter such order in a record-book in his office.

“3415. After such order is made, either party may bring an action in the Superior Court of the county in which the land in question is situated to determine the conflict, and the production of a certified copy of the entry made by either the surveyor-general or the register gives the court full and complete jurisdiction to hear and determine the action.

“3416. Upon filing with the surveyor-general or register, as the case may be, a copy of the final judg-

ment of the court, that officer must approve the survey or location, or issue the certificate of purchase or other evidence of title in accordance with such judgment."

The statutes might have provided that the register should determine questions of *law* as well as questions of fact between those seeking to purchase the same tract of state lands, and made his determination final, so as to entitle the party in whose favor it might be to the certificate of purchase. In such case, all intended purchasers would have had notice of the fact that their right to the certificate would thus be determined by the register.

The jurisdiction of the Superior Court to determine these contests is derived from section 3415 of the code. *Pro hac* the court acts in the place of the officer; its judgment or that of the appellate court being made conclusive on the officer by the statute. The order of the register referring the matter is based upon a *contest* already existing in the land-office,—a contest of which both parties have notice,—and both must be assumed to have notice of the order. The order, and all proceedings prior and subsequent to the order of reference, assume the title to the land to be in the state. When a person applies to purchase lands of the state, he knows that, in case a contest arises between himself and another applicant, the dispute may under certain circumstances be decided by the register, or that it may be referred to the Superior Court, and that in the last case, if the action (which is a mode of bringing the contest before the court) is commenced by the other contestant, he may be notified of it by publication of the summons in case he is not a resident of the state. He consents to this mode of service in advance. The state has consented by the statute that the judgment shall determine which of the two contestants shall receive the certificate of purchase, and the judgment, to the full extent of its scope and purpose, is binding on all the world. Whether the

proceeding is *ad rem* strictly or not the applicant has subjected himself in advance to the mode of deciding his right to purchase provided by the statutes. The court, like the register, is an agent of the state, to whom is committed the power of determining whether the applicant has complied with the terms on which alone he is permitted to purchase the land. The case does not come within the rule laid down in *Pennoyer v. Neff*, 95 U. S. 714.

Judgment affirmed.

MYRICK, J., and MORRISON, C. J., concurred.

[No. 11190. Department One.—July 14, 1886.]

THE STATE OF CALIFORNIA, APPELLANT, *v.* JOHN SMITH, JR., ET AL., RESPONDENTS.

ESTATE OF DECEDENT — NON-RESIDENT FOREIGNERS — RIGHTS OF SUCCESSION — CONSTITUTIONAL LAW. — The constitution does not prohibit the legislature from conferring upon non-resident foreigners the same rights with respect to the acquisition, possession, enjoyment, transmission, and inheritance of property as are guaranteed by that instrument to resident foreigners.

Id. — SECTION 671 OF CIVIL CODE. — The legislature had power to provide, by section 671 of the Civil Code, for the succession to property by foreigners who have never been residents. That section provides a rule with respect to property within the state, and confers a right to be enjoyed within its jurisdiction.

Id. — NON-RESIDENT ALIENS — WHO ARE. — The words "non-resident aliens," as used in section 672 of the Civil Code, mean those persons who are neither citizens of the United States nor residents of the state.

Id. — APPEARING AND CLAIMING PROPERTY — LIMITATION ON RIGHT. — Under that section, the failure of a non-resident alien to appear and claim the property within five years after descent cast operates a bar of his right to assert any title in the property as against the state. But any appearance within the state, and the assertion of a claim to the property, either by action, or by taking possession of or conveying or contracting with respect to it, within the time limited, is sufficient to render the bar of the statute inoperative.

Id. — PROCEEDING BY STATE TO VEST TITLE — WHEN SHOULD BE BROUGHT. — A proceeding brought by the attorney-general to

vest title in the state as to property alleged to have escheated to it under section 672 of the Civil Code is premature if commenced within five years after the death of the ancestor.

APPEAL from a judgment of the Superior Court of Sacramento County.

John Smith, a native of England residing in California, and a naturalized citizen of the United States, died intestate in Sacramento, California, November 3, 1883, leaving certain real and personal property therein as his estate. He left no heirs resident in the United States, but he did leave one nephew and three nieces, natives of and residing in England, as his only next of kin. The nephew, John Smith, Jr., came to California and obtained letters of administration upon the estate, after having declared his intention to become a citizen of the United States. The estate was distributed to and thereafter sold by the next of kin to the defendants other than John Smith, Jr., and the administration closed. The suit was commenced by the attorney-general in the name of the state on January 25, 1885, to declare all the estate of John Smith escheated, because, as alleged, the nephew and nieces cannot inherit in California. Judgment was rendered in favor of the defendants. The further facts are stated in the opinion of the court.

Attorney-General Marshall, and S. P. Scaniker, for Appellant.

A non-resident alien is not entitled to succeed to property in California, and the sections of the Civil Code purporting to give him that right are unconstitutional. (Const., art. 9, sec. 4; art. 1, sec. 17.) Upon the death of the intestate, the title to his estate vested *eo instanti* in the state of California, in trust for the support of the common schools. (*Fairfax v. Hunter*, 7 Cranch, 603; *Jackson v. Adams*, 7 Wend. 367; *Wilbur v. Tobey*, 16 Pick. 177; *Commonwealth v. Hite*, 6 Leigh, 588; *Taylor v.*

Benham, 5 How. 233; *Farrell v. Enright*, 12 Cal. 450; *People v. Folsom*, 5 Cal. 373; *Ettenheimer v. Heffernan*, 66 Barb. 374; Const., sec. 4, art. 9; *State v. Reeder*, 5 Neb. 203.) After the estate had vested in the state, its title could not be divested by the arrival of one of the next of kin, although he declared his intention to become a citizen of the United States. (*Heency v. Trustees of Brooklyn Benevolent Society*, 33 Barb. 360.) The administration proceedings were void, because the title to the estate had vested in the state. (*State v. Reeder*, 5 Neb. 203; *Den. ex rel. Van Kleek v. O'Hanlon*, 21 N. J. L. 582; *Hinkle v. Shaddon*, 2 Swan, 49.)

Grove L. Johnson, Armstrong & Hinkson, and *Ed. M. Martin*, for Respondents.

The points involved in this case have been decided adversely to the appellant in *Lyons v. State*, 67 Cal. 380; *Estate of Billings*, 64 Cal. 427; *Carrasco v. State*, 67 Cal. 385; *People v. Rogers*, 13 Cal. 159.

McKINSTRY, J.—The constitution (art. 1, sec. 17) prohibits the legislature from depriving resident foreigners of any of the rights enjoyed by native-born citizens with respect to the acquisition, possession, enjoyment, transmission, or inheritance of property.

There is no provision of the constitution which prohibits the legislature from conferring the same rights upon those born in foreign countries who have never been residents of the state.

Section 671 of the Civil Code provides:—

“Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state.”

It is suggested that inasmuch as laws can have no extraterritorial operation, the legislature has no power to provide for succession by foreigners who have never been residents. But the section of the code provides a rule

with respect to property within the state. It confers a right to be enjoyed within the jurisdiction.

Section 672 of the Civil Code reads: —

“ If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in title 8, part 3, of the Code of Civil Procedure.”

The words “non-resident alien” are severely criticised by counsel for appellant. We find no difficulty in interpreting them as indicating those who are neither citizens of the United States nor residents of the state.

All aliens take *by succession*. (Civ. Code, sec. 671.) The failure of a non-resident alien to “appear and claim” within five years after descent cast operates a bar of his right to assert any title in the property as against the state. And this not on the idea that the property has escheated to the state, as of the date of the death of the ancestor, but because by the law the “non-resident” takes subject to the loss of his right by a failure to make claim within the five years. The clause of section 672 is a limitation, applicable, however, not alone to the commencement of an action in the courts, but to any appearance within the state and the assertion of a claim, whether by such action or otherwise. The claim may be *in pais*, as by taking possession of the property, or conveying or contracting with respect to it. If he fails to appear and claim it, the property is escheat at the expiration of the five years. In “such case” the property is disposed of as provided in title 8, part 3, of the Code of Civil Procedure.

It would seem to follow that a “non-resident alien” would have no defense to an inquest to “vest the title in the state” in the nature of office found, except a defense based on his “appearance and claim” within the five years, and it necessarily follows that a proceeding brought by the attorney-general under title 8, part 3, is premature

if commenced within five years after the death of the ancestor.

Section 1272 of the Code of Civil Procedure, so far as it applies to a non-resident alien, not a party or privy to the proceedings prescribed in title 8, only authorizes him to show that which he might have shown had he been made a party, to wit, that he did appear and claim the property "within five years from the time of the succession."

The statute gives to the non-resident alien full five years to "appear and claim" the property, and gives him no more. There is no limitation of time (certainly none less than ten years after the "succession") within which the action provided for in the Code of Civil Procedure must be commenced by the attorney-general. The five years given the non-resident alien can have no reference to the proceeding commenced by the attorney-general. No statutory machinery is provided in accordance with which the alien must appear and give notice of his claim. The provision of section 672 of the Civil Code, requiring the alien to "appear and claim the property," relates to an appearance and claim, to be proved by acts within the state indicating that the alien asserts a right to it, or the provision means nothing.

Section 4 of article 9 of the constitution provides that "the proceeds" of the estates of deceased persons who may have died without leaving any "heir" shall constitute a part of the school fund. It does not limit the power of the legislature to declare that aliens may be heirs. Moreover, it speaks of the *proceeds* of the lands, evidently contemplating some procedure in the nature of office found by which the right of the state shall be ascertained and determined, and legislation providing for the sale of the land.

Judgment affirmed.

MYRICK, J., and Ross, J., concurred.

[No. 11157. Department One.—July 14, 1886.]

GRAND LODGE OF THE INDEPENDENT ORDER
OF GOOD TEMPLARS OF THE STATE OF CALI-
FORNIA, APPELLANT, *v.* ELMA C. FARNHAM.
EXECUTRIX, ETC., OF S. C. FARNHAM, DECEASED, RE-
SPONDENT.

SUBSCRIPTION TO CHARITABLE OBJECT — LIABILITY OF SUBSCRIBER
— ACCEPTANCE OF OFFER — DEATH OF SUBSCRIBER. — A promise to pay a subscription to help defray the expenses of some charitable object is a mere offer, which may be revoked at any time before it is accepted by the promisee; and an acceptance can only be shown by some act by the promisee whereby a legal liability is incurred or money is expended on the faith of the promise. If the promisor die before his offer is accepted, it is thereby revoked, and cannot afterwards, by any acts showing an acceptance, be made enforceable against his estate. The rule is otherwise when subscribers agree together to make up a specified sum, and where the withdrawal of one increases the amount to be paid by the others. In such a case, as between the subscribers, there is a mutual liability, and the co-subscribers may maintain an action against one who refuses to pay.

APPEAL from a judgment of the Superior Court of Solano County.

The facts are stated in the opinion.

George A. Lamont, and Joel A. Harvey, for Appellant.

S. G. Hilborn, and F. W. Hall, for Respondent.

BELCHER, C. C.—The court below sustained a demurrer to the complaint, and whether it erred in so doing or not is the only question presented for decision.

The facts as stated in the complaint are substantially as follows:—

The plaintiff was the owner of certain real property in Solano County, on which was erected the Good Templars' Home for Orphans. At the time of filing the complaint, and for a long time prior thereto, the home was conducted and managed by the plaintiff. In 1883 it was

deemed important to erect an addition to the home, so that a greater number of orphans could be taken care of thereat; and to raise money for that purpose, subscription papers were circulated and subscriptions solicited by an agent employed by the plaintiff.

In September, 1883, S. C. Farnham, the defendant's testator, subscribed one of these papers and placed opposite his name as the amount of his subscription one thousand dollars.

On the first day of December, 1883, Farnham died, leaving a will. The will was admitted to probate, and notice to creditors published, and then plaintiff presented to the executrix its claim for the one thousand dollars subscription and the claim was rejected. In October, 1883, the agent employed to get subscriptions reported to the plaintiff the amount of money collected and then on hand, and the amount subscribed and unpaid, of which the larger part was the one thousand dollars subscribed by Farnham. The plaintiff afterwards, but it does not appear when, commenced to erect an addition to the home, and was still prosecuting the work when this action was commenced.

The demurrer was upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

The general rule is, that a promise to pay a subscription like that declared on here is a mere offer, which may be revoked at any time before it is accepted by the promisee. And an acceptance can only be shown by some act on the part of the promisee whereby some legal liability is incurred or money is expended on the faith of the promise.

If the promisor dies before his offer is accepted, it is thereby revoked, and cannot afterwards, by any act showing acceptance, be made good as against his estate. (*Pratt v. Trustees*, 93 Ill. 475; *Beach v. First M. E. Church*, 96 Ill. 179; *Phipps v. Jones*, 20 Pa. St. 260; *Hel-*

fenstein's Estate, 77 Pa. St. 331; *Cottage Street Church v. Kendall*, 121 Mass. 528.)

The rule is otherwise where subscribers agree together to make up a specified sum, and where the withdrawal of one increases the amount to be paid by the others. In such case, as between the subscribers, there is a mutual liability, and the co-subscribers may maintain an action against one who refuses to pay. (*George v. Harris*, 4 N. H. 533; *Curry v. Rogers*, 21 N. H. 247; 1 Wharton on Contracts, p. 719.)

Here it is not alleged in the complaint that the plaintiff entered into any contract, incurred any liability, or expended any money for the erection of an addition to the home for orphans before the death of Farnham. His subscription was therefore withdrawn by his death, and was not a valid claim against his estate.

Counsel for appellant cite *Christian College v. Hendley*, 49 Cal. 347, but that case is not in conflict with what has been said. And besides, the matter quoted from *Watkins v. Evans*, 9 Cush. 539, has since been held by the same court, in *Cottage Street Church v. Kendall, supra*, to be *obiter dictum*, and inconsistent with elementary principles.

We think the demurrer was properly sustained, and the judgment should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 11376. Department One.—July 14, 1886.]

A. GRANDONA, APPELLANT, *v.* O. O. LOVDAL, RESPONDENT.

NUISANCE — OVERHANGING TREES — ABATEMENT. — Trees whose branches extend over the land of another are only a nuisance to the extent that the branches overhang the adjoining land. To that extent they are nuisances, and the person over whose land they extend may cut them off, or have his action for damages and an abatement of the nuisance; but he cannot cut down the trees, nor remove the branches thereof except so far as they overhang his soil. If he is damaged by the roots of the trees projecting into his land, they may also be abated.

Id. — PLEADING — ACTION FOR ABATEMENT AND DAMAGES — MISJOINER OF CAUSES OF ACTION. — A complaint which seeks to abate an alleged nuisance, and to recover damages for injuries caused thereby, is not demurrable for misjoinder of causes of action.

Id. — DAMAGES — SPECIFIC ALLEGATIONS OF — AMBIGUITY. — Where the complaint alleges that the nuisance has occasioned several distinct injuries to the plaintiff, the amount of the damage caused by each injury must be averred; otherwise the complaint will be ambiguous and uncertain.

APPEAL from a judgment of the Superior Court of Sacramento County.

The action was brought to compel the defendant to remove a certain line of trees on or near the boundary of his land and the land of the plaintiff, and to recover damages alleged to have been caused by reason of the existence of the trees during the preceding four years. The complaint alleged in effect that the trees had been allowed to grow to such a size that they had caused damage to the land of the plaintiff by lessening its value, and by reason of their dense shade, falling leaves, and protruding roots, and had broken down the division fence between his land and that of the defendant, so that stock belonging to the latter were enabled to trespass upon his land. The defendant demurred to the complaint, on the grounds that it did not state facts sufficient to constitute a cause of action; that several causes of action were improperly joined and not separately stated, and that it was

ambiguous, unintelligible, and uncertain, because it did not specifically state the amount of damage resulting from either the shade, the falling leaves, or the decrease in value of the land. The demurrer was sustained, and the plaintiff declining to amend, judgment was rendered in favor of the defendant. The further facts are stated in the opinion of the court.

Henry Starr, and A. P. Catlin, for Appellant.

The trees were a nuisance. (Civil Code, sec. 3501; *Ball v. Nye*, 99 Mass. 582; *Wilson v. New Bedford*, 108 Mass. 261; Wood on Nuisance, secs. 103-106, 865; *Meyer v. Metzler*, 51 Cal. 142.)

Freeman, Bates & Rankin, for Respondent.

The remedy of plaintiff was by cutting off the overhanging branches and protruding roots. (*Countryman v. Lighthill*, 24 Hun, 407.)

McKINSTRY, J.—The court below sustained a demurrer to the complaint. “Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they *are* nuisances, and the person over whose land they extend may cut them off or have his action for damages, and an abatement of the nuisance against the owner or occupant of the land on which they grow, but he may not cut down the *tree*, neither can he cut the branches thereof beyond the extent to which they overhang his soil.” (Wood on Nuisances, sec. 112, citing *Commonwealth v. Blaisdell*, 107 Mass. 234; *Commonwealth v. McDonald*, 16 Serg. & R. 390.)

So, it would seem, he may have abated the roots projecting into his soil, at least if he has suffered actual damage thereby.

The general demurrer should have been overruled.

The defendant also demurred on the ground of the mis-

joinder of actions. There is only one count in the complaint. There is no direct averment therein that the trees have so grown as that any portion of the trunks are on plaintiff's land. The averments as to the trunks having so grown as to break the dividing fence, and thus let in hogs which have destroyed plaintiff's crops, may be rejected as surplusage, and not to be treated as a statement of a separate cause of action.

While we are compelled to hold that the complaint is not subject to general demurrer, nor to a demurrer for misjoinder of actions, we think that it is ambiguous and uncertain.

Judgment affirmed.

MYRICK, J., and Ross, J., concurred.

[No. 9232. Department One.—July 19, 1886.]

J. J. McCALLION ET AL., RESPONDENTS, *v.* HIBERNIA SAVINGS AND LOAN SOCIETY ET AL. EDWARD DEVLIN ET AL., APPELLANTS.

UNINCORPORATED ASSOCIATION — REMOVAL OF OFFICERS — RIGHTS OF SECEDED MEMBERS. — Where the laws governing a voluntary unincorporated association provide a remedy within the association for any offense committed by its officers, no opposition by the officers to the authority under which they act in the performance of their functions, nor irregularity in the performance thereof, will authorize a part of the members of the association to secede for the purpose of expelling its regularly elected officers, declaring their offices vacant, and constituting themselves successors.

CORPORATION — DEFECTIVE CERTIFICATE OF INCORPORATION — EVIDENCE. — A document purporting to be a certificate of incorporation, which is legally defective for want of conformity to the statutory requirements, is not proof of a corporation *in esse*.

ACTION — ATTEMPT TO COMPROMISE — EFFECT OF. — The rights of the parties to an action are not affected by an attempt and failure to compromise the litigation, irrespective of the cause which produced the failure.

APPEAL from an order of the Superior Court of the city and county of San Francisco refusing a new trial.

The action was brought to recover certain moneys deposited in the Hibernia Savings and Loan Society. The bank thereupon paid the money into court, and asked that certain other claimants be substituted as defendants. This was done. Judgment was rendered in favor of the plaintiffs. The substituted defendants subsequently moved for a new trial, which was refused. The further facts are stated in the opinion of the court.

M. C. Hassett, J. D. Sullivan, and D. T. Sullivan, for Appellants.

D. L. Smoot, for Respondents.

McKEE, J.—This is an appeal from an order denying a motion for a new trial.

The order appealed from was made upon a statement of the case.

The case shows that plaintiffs and substituted defendants respectively claim to be the officers and directors of an association or society in the city and county of San Francisco known as the Ancient Order of Hibernians, Division No. 1, and entitled to a fund composed of moneys paid into court by the Hibernia Savings and Loan Society, which were deposited with it from time to time by said division No. 1.

Upon the trial of the issues raised by the pleadings between these rival claimants of the fund, the court found as facts:—

“ 1. That the \$3,349.15 paid into court by the Hibernia Savings and Loan Society, and now in the treasury of the city and county of San Francisco, is the property of division No. 1 of the Ancient Order of Hibernians of the city and county of San Francisco.

“ 2. That the plaintiffs constitute and represent the said division, and the substituted defendants do not.

“ 3. That the said division is not a corporation, but a voluntary association of persons for benevolent purposes;

and that the substituted defendants, designated as the Ancient Order of Hibernians' General Benevolence Society of California, is not an existing corporation with title to said money.

"4. That the said division annually selects certain of its members to take charge of the division's property, and styles them trustees; that these trustees at present are John Collins, John Breslin, P. M. Cleary, Michael Sullivan, and Daniel O'Leary."

Upon these facts the court awarded possession and control of the fund to the plaintiffs in trust for the use and benefit of division No. 1.

The principal grounds assigned by defendants upon their motion for a new trial were, that the findings, conclusions of law, and judgment are wholly unsupported by the evidence, and that the findings are not responsive to the issues made by the pleadings. It is upon these grounds that the case has been argued and submitted.

As to the first finding, both parties concede that the fund in controversy belonged to division No. 1 of the Ancient Order of Hibernians, of the city and county of San Francisco.

As to the second finding, the evidence contained in the record clearly shows that the "division" was organized by authority, in January, 1869, as a voluntary Catholic association or society for benevolent purposes; that it has since continued to exist, maintaining fraternal relations between all its members and with other divisions of the order until the year 1878; that in that year the division had on its roll-call the names of five hundred members, and on deposit in bank several thousands of dollars; that it held annual elections of officers in June of each year, and that, in June, 1878, the plaintiffs were regularly elected and qualified as its officers and directors.

The election of these officers was never contested, and for several months they exercised their functions without dissension or disorder. But in September, 1878, the

county judicature of the order in San Francisco discovered that the president and the other officers of the division in initiating new members into the order worked under a formula which it considered illegal, because it was not in conformity with the rules and regulations upon the subject promulgated by a national convention of the order held in Boston in May, 1878, and it directed the president to change the mode of initiation so as to conform to the law of the order as established by the Boston convention. In the same year, however, a national convention of the order which was held in New York denounced the Boston convention as an illegal body, wholly without authority to give law to the order in the United States; and division No. 1 in San Francisco, following New York, refused to obey the "county delegate," and continued to work under the formula of initiation which, it claimed, was prescribed by the "head of the order" in Ireland. This created dissension in the order, and upon a question as to the proper form of initiation, not only division No. 1, but the order itself, "split" in two.

Admittedly, however, certain of the defendants, in connection with such others of the members of division No. 1 as recognized the authority of the Boston convention, refused to attend the division meetings; and on the 8th of November, 1878, they held a special meeting outside the division-room, presided over by the county delegate of the order, at which a resolution was passed declaring that the offices of president and treasurer of the division were vacant, and two of the defendants were selected to fill the vacancies, and others of them were chosen to act as trustees. But such action was without color of authority. Neither opposition to the authority under which officers of an association act in the performance of their functions, nor irregularity in the performance of their functions, will authorize members of the association to secede for the purpose of expelling its

regularly elected officers, declaring their offices vacant, and constituting themselves as their successors in office. For any offense committed by a division officer, the laws of the order provided a remedy *within*, and not without, the division itself. An outside movement would be wholly ineffectual to disturb him in his office. So that when the plaintiffs commenced their action, in January, 1879, they were legally in possession of the organization as the legally elected officers and trustees of the division; and the finding of the court that they represented the division, and were entitled to the possession and control of its funds, is fully sustained by the evidence.

As to the third finding, there appears to have been no conflict in the evidence upon which it is founded. The only evidence upon the question is, that in July, 1869, when the division numbered fifty or sixty members, two of them,—Bernard Conlin and William Dolan,—on the 14th of July, 1869, prepared a certificate to the effect "that on the 12th of July, 1869, a meeting of the members of a society or association not yet incorporated, known as 'the Ancient Order of Hibernians' General Benevolent Society of California, was held for the purpose of incorporating themselves according to law; that at the meeting it was resolved that the said society should be incorporated and assume corporate powers under the laws of the state, and exercise such powers under the said corporate name, having its principal place of business in the city of San Francisco; and that there was then chosen by ballot seven persons to act as a board of directors of said corporation for one year.'" This certificate Conlan and Dolan signed, acknowledged, and caused a copy to be filed in the office of the secretary of state. But as articles of incorporation, the certificate was legally defective, for want of conformity to the statutory requirements under which it purported to have been made; and aside from the defects which rendered it inept, Conlan and Dolan and those acting with them in the movement did not attempt to exercise corporate func-

tions under it in connection with or as division No. 1 of the Ancient Order of Hibernians. Therefore the certificate was not proof of a corporation *in esse*. (Wood's Digest, p. 119, sec. 2; *Mokelumne Hill M. Co. v. Woodbury*, 14 Cal. 425; S. C., 73 Am. Dec. 658; *Harris v. McGregor*, 29 Cal. 127; *People v. Selfridge*, 52 Cal. 331.)

Besides, it was not claimed by the defendants that there existed at the commencement of the action a society or association by the name of the Ancient Order of Hibernians' General Benevolent Society of California as a chartered corporation, or that they were under that corporate name entitled to the funds of the division; and the finding that the division was not a corporation, and that the defendants were not a corporation with title to the division's funds, was fully sustained by the evidence.

But it is insisted that the order appealed from should be reversed because the court did not find upon an issue of compromise presented by certain supplemental pleadings in the case.

There was evidence given, without objection, which proved that a state convention of the order had met at San José after the commencement of the action, and proposed a compromise of the dissensions in the division, and that the plaintiffs and the defendants afterward held a meeting for the purpose of harmonizing and settling their disputes; but the meeting was discordant, and resulted in failure. Whether that was in consequence of the conduct of one or the other of the contesting parties is of no moment. The proposed compromise did not affect the title of the plaintiffs to their offices, and by the failure to compromise, from whatever cause, they did not waive any of their legal rights. So far as the question of their rights was concerned, the issue of a compromise was immaterial, and it was not necessary for the court to make any finding about it.

Order affirmed.

Ross, J., and McKinstry, J., concurred.

[No. 9326. Department Two.—July 19, 1886.]

F. M. PFISTER, APPELLANT, v. THE CENTRAL PACIFIC RAILROAD COMPANY, RESPONDENT.

COMMON CARRIER — LUGGAGE. — The term "luggage," as used in the Civil Code, has the same meaning as the word "baggage."

Id. — MONEY WHEN NOT LUGGAGE. — Under section 2181 of the Civil Code, money belonging to a passenger on a railroad, and intended for trade, business, investment, or transportation, and not for the use of the passenger while traveling, is not luggage.

Id. — RAILROAD — PASSENGER — CONTRACT IMPLIED BY TICKET. — A railroad ticket entitling the purchaser to transportation in the first-class passenger-coaches of the seller between the points indicated thereon gives him a right to have his luggage — not exceeding the quantity specified in the ticket — transported at the same time free of charge; but it does not give the purchaser a right to travel in a baggage, express, or freight car, or to transport, either in his own charge or that of the railroad, any merchandise or property not included in the term "luggage."

Id. — COUNTY TREASURER — CANNOT CARRY MONEY AS A PASSENGER. — A county treasurer who purchases a railroad ticket entitling him to first-class passenger transportation has no right to carry with him in a passenger train certain money which he is required by law to pay over to the state treasurer at the place of destination, although the railroad had for many years previously acquiesced in such a practice, and accepted him as a passenger with knowledge that he had the money with him.

Id. — COUNTY TREASURER NOT A PUBLIC MESSENGER. — A county treasurer traveling with money which he is obliged by law to pay into the state treasury is not a public messenger within the meaning of the act of April 4, 1864, requiring the Central Pacific Railroad to carry such messengers over their road free of charge.

Id. — DUTY OF CARRIER AS TO ACCEPTING AND CARRYING. — Under section 2169 of the Civil Code, a common carrier of goods is under no obligation to accept and carry all personal property that may be offered. Its duty is confined to accepting and carrying property of a kind that it undertakes or is accustomed to carry.

Id. — EXPRESS FACILITIES — RAILROAD NEED NOT FURNISH TO ALL. — In the absence of a usage to that effect, or of some statute requiring them so to do, it is not the duty of railroad companies to furnish facilities for the transportation of express matter to all alike who demand them.

APPEAL from a judgment of the Superior Court of Santa Clara County.

The facts are stated in the opinion.

J. J. Burt, for Appellant.

W. H. L. Barnes, for Respondent.

SEARLS, C.—This is an action to recover from the defendant, a corporation, engaged in the business of a common carrier of passengers and freight for hire by cars drawn over a railroad by steam-engines, damages in the sum of fifty thousand dollars for refusal to carry certain treasure for plaintiff.

Defendant interposed a demurrer to the complaint, which was sustained by the court, and judgment, upon refusal by plaintiff to amend, was entered in favor of defendant, from which judgment this appeal is taken.

It appears from the complaint that the plaintiff was the county treasurer of the county of Santa Clara, and as such it was his duty to pay over and deliver to the state treasurer at Sacramento, California, certain funds due the state from him as such county treasurer.

On the nineteenth day of January, 1883, plaintiff purchased from the defendant at San José, in the county of Santa Clara, for sixteen dollars, four first-class passenger tickets, entitling four persons to first-class passage from said San José to Sacramento. Furnished with these tickets, plaintiff and three employees, having with them \$91,952 in gold coin of the United States, contained in small leather satchels, which they carried in their hands, boarded a passenger train of defendant with such treasure, and were permitted by the conductor, who had knowledge of the contents of the satchels, to retain possession of and carry the same as far as Niles, a way-station on the railroad leading to Sacramento, where it became necessary to change cars and take another train for the latter place.

The conductor of the train from Niles refused to permit plaintiff and his employees to enter the passenger-car with their treasure, and required plaintiff, if he desired to carry said money to Sacramento, to deliver the same to Wells, Fargo & Co., an express company, en-

gaged as common carriers for hire in the business of carrying treasure and that class of goods known as "express matter" over the railroad of defendant from San José to Sacramento, and to which company defendant had given the exclusive privilege of carrying money upon its trains from San José to Sacramento, so far as such money exceeded such sums as might be carried by a passenger traveling on its trains.

Defendant had provided accommodations for Wells, Fargo & Co. in a baggage-car, had not provided any special cars for persons generally having money to carry to Sacramento, and all such persons, under the rules and regulations of defendant, were obliged to give up to Wells, Fargo & Co., for transportation, all money outside of that which they could carry as passengers.

Plaintiff at first refused to surrender his money to Wells, Fargo & Co., and insisted that he and his employees had a right to go into some car of the train without any extra charge for carrying the money, beyond their regular passenger fare, but at the same time told the conductor that rather than be left at Niles or give up the custody of his treasure to Wells, Fargo & Co., he would go into the baggage or any other car of defendant which might be designated, and would pay to defendant any charges which might be exacted for the transportation of the money, all of which was refused; and plaintiff thereupon, to avoid being left at Niles, delivered the money to the express company for transportation to Sacramento, paying for such transportation the sum of \$68.95.

The money which plaintiff was carrying was funds which he, as county treasurer, had received, and was conveying to Sacramento to pay over to the state treasurer, being due from him in his official capacity to the state of California, and his employees were taken along as guards of said money and to aid in carrying the same, all of which was known to defendant.

It had been the custom of the defendant for ten years prior to January 19, 1883, to permit the county treasurer to carry like money in like satchels upon its passenger trains free of charge, and no notice was given to plaintiff of any change in such custom.

At the date when said money was carried to Sacramento, the defendant did not receive and transport money as freight; did not permit persons to travel on its freight trains and carry money as freight; would not check and carry the same as baggage on its passenger trains; and would not have received said money for transportation as freight, baggage, or otherwise; and the only way by which the plaintiff could have transported his money to Sacramento by said railroad was by carrying it himself or by delivering it to Wells, Fargo & Co. for transportation, as required by defendant.

The complaint further proceeds to show, in apt language, that the defendant is subject to, bound by, and by express agreement duly filed has accepted and is bound to execute on its part the duties and discharge the obligations imposed by an act of the legislature of the state of California, approved April 4, 1864, entitled "An act to aid the construction of the Central Pacific Railroad, and to secure the use of the same to this state for military and other purposes, and other matters relating thereto," and showing that the railroad from San José to Sacramento is a portion of the railroad to which said act of the legislature is applicable.

The defendant was a common carrier of passengers and freight between San José and Sacramento, and upon receiving the reasonable and customary payment therefor, it was its duty to receive and carry upon its passenger trains all persons desiring to travel thereby, with a reasonable amount of luggage for each passenger without charge, except for an excess of weight over one hundred pounds. (Civ. Code, sec. 2180.) "Luggage may consist of any articles intended for the use of a passenger while

traveling or for his personal equipment." (Civ. Code, sec. 2181.)

"The liability of a carrier for luggage received by him with a passenger is the same as that of a common carrier of property." (Civ. Code, sec. 2182.)

A common carrier by railroad must check and carry in a regular baggage-car the luggage of passengers over his road, and must deliver such luggage immediately upon the arrival of the passenger at his destination; and whenever passengers neglect or refuse to have their luggage so checked and transported, it is carried at their own risk. (Civ. Code, sec. 2183.)

The question of whether money can or cannot be treated as luggage has been frequently determined by the courts, and usually to the effect that, except as to such limited amount as may be necessary for personal use to defray expenses of the passenger, it is not luggage. (*Orange Co. Bank v. Brown*, 9 Wend. 85; S. C., 24 Am. Dec. 129; *Pardee v. Drew*, 25 Wend. 459; *Miss. Cen. R. R. Co. v. Kennedy*, 41 Miss. 671; *Smith v. Boston & Maine R. R.*, 44 N. H. 325; *Cin. & Chicago Air Line R. R. v. Marcus*, 38 Ill. 219; *M. S. & N. I. R. R. Co. v. Oehm*, 56 Ill. 293; *Jordan v. Fall River R. R. Co.*, 5 Cush. 69; S. C., 51 Am. Dec. 44; *Hawkins v. Hoffman*, 6 Hill, 586; S. C., 41 Am. Dec. 767; *Hickox v. Naugatuck R. R. Co.*, 31 Conn. 281; *Hutchings v. Western etc. R. R. Co.*, 25 Ga. 61; S. C., 71 Am. Dec. 156.)

Some of the cases cited *supra* hold that neither money nor merchandise are included in the term "baggage." We do not find it necessary, however, to decide that precise point in this case. The terms "baggage" and "luggage" signify one and the same thing.

The former is the term in general use in the United States, while in England the latter prevails. Our code has adopted the English expression.

We think it clear, alike from section 2181 of the Civil Code and from adjudicated cases, that money intended for

trade or business or investment, or, as in this case, for transportation, and not intended for the use of the passenger while traveling, *is not luggage*.

It follows that plaintiff and his employees had no right to transport as *luggage* the money in question upon the passenger and express train of defendant.

The right of plaintiff as a passenger must be determined by the contract he made with defendant.

He purchased four first-class passenger tickets from San José to Sacramento, which entitled him and his three employees to transportation in the first-class passenger-coaches of defendant between the points indicated, and gave to them a right to have their luggage, not exceeding one hundred pounds to each person, transported at the same time free of charge.

It gave to them no right to travel in a baggage, express, or freight car, but in the regular passenger-car or cars of the defendant, and the contract gave to them no right to transport, either in their own charge or that of the defendant, any merchandise, or property not included in the term "luggage."

The law takes no note of what property a passenger carries upon his person, but beyond this he may not by virtue of his contract for passage carry either free of charge or by paying an extra charge property not included within the import of the term "luggage."

Were it otherwise, it would be within the power of the passenger to convert the passenger coaches of a railroad company into vans for the transportation of merchandise, or to compel the carrier to do much the same thing by furnishing baggage-cars for the conduct of ordinary freight.

The orderly and expeditious transit of passengers and their baggage renders it necessary and proper for the carriers engaged in their transportation to run separate trains for their accommodation, or at least to furnish and transport them in cars separate from those devoted to the car-

riage of freight; and this result can only be accomplished by requiring the carrier on the one hand, and the passenger upon the other, to refrain from making passenger-cars the receptacles for merchandise.

Plaintiff must be presumed to know the legal effect of the contract he had made, and to be subject to its terms, conditions, and limitations equally with the defendant.

The fact that for ten years the defendant had permitted the county treasurers of Santa Clara County to carry with them upon its passenger trains the money which they were by law required to pay over to the state treasurer neither enlarged nor abridged the contract between it and plaintiff.

If defendant was not legally bound to extend this favor, its liberality to others or to plaintiff himself could not be urged as a binding rule for the continuance of such practice.

The theory of plaintiff, that by having accepted him as a passenger with knowledge of the money he had with him the defendant became a common carrier of him and his money, though he retained possession of the latter, is not sustained by the authorities cited. *Minter v. Pacific R. R.*, 41 Mo. 504; *Butler v. Hudson R. R. Co.*, 3 E. D. Smith, 571; *Stoneman v. Erie R. R. Co.*, 52 N. Y. 429; *Sloman v. G. W. R. Co.*, 67 N. Y. 208; and *Hannibal R. R. Co. v. Swift*, 12 Wall. 262,—were all cases in which the property was delivered to the carrier, and although not baggage, it was held that, having received it with knowledge that it was not the ordinary traveling baggage of the passenger, the liability of a common carrier attached.

We are clearly of opinion that the defendant was under no obligation by virtue of its contract of passage with plaintiff as an individual to permit him to carry with him in its passenger-car the sum of money indicated in the manner indicated, and weighing, as it must have done, between three hundred and four hundred pounds.

Whether independent of contract the defendant was or was not, as a common carrier, in duty bound to receive and transport the money of the plaintiff depends upon other considerations affecting such duty, and will be considered hereafter.

But appellant contends:—

2. That if as a private citizen the treatment of plaintiff would have been right, still, as the treasurer of the county of Santa Clara, with money belonging to the state, to be paid into the state treasury, he occupied a different position, and was as such treasurer entitled to take the money to Sacramento, the capital of the state and official residence of the state treasurer.

As county treasurer, it was his duty to safely keep the public funds in his custody, and at stated intervals to settle with the controller, and to pay over in cash to the state treasurer the sum found due to the state. This duty presupposes the necessity of a visit in person at Sacramento and the delivery there of the amount due the state, and the county treasurer is responsible personally and upon his official bond until the money is so paid.

The defendant, if within the purview of the act of April 4, 1864, and under the allegations of the complaint, which are to be taken as true, we shall so regard it, was bound, in consideration of certain obligations assumed by the state of California, and of certain privileges extended to it to "transport and convey over their said railroad all public messengers, convicts going to the state prison, lunatics going to the state insane asylum, materials for the construction of the state capital building, articles intended for public exhibition at the fairs of the State Agricultural Society, and in case of war, invasion, or insurrection, as well as at all other times, also transport and convey over their said railroad all troops and munitions of war belonging to the state of California free of charge, and without any other compensation than as herein provided." (Stats. 1863-64, p. 344.) If plain-

tiff was entitled to a free passage or to carry the money in question under this law, it must have been because he was a *public messenger*.

A messenger is defined by Webster to be "one who bears a message or an errand; the bearer of a verbal or written communication, notice, or invitation from one person to another or to a public body; an office servant."

The term, by its fair import and significance, does not apply to a public officer acting in an original capacity in the discharge of duties imposed upon him by law, but presupposes a superior in authority whose servant the messenger is and whose mandate he executes, not as a deputy, with power to discriminate and judge, or to bind his superior, but as a mere bearer and communicator of the will of his superior.

If a county treasurer is to be treated as a public messenger, we see no good reason why legislators and state officers, having enjoined upon them duties requiring their presence at the state capital, may not with equal propriety be entitled to free conduct as "public messengers."

Under the nineteenth section of the twelfth article of our state constitution, "no railroad or other transportation company shall grant free passes, or passes or tickets at a discount, to any person holding an office of honor, trust, or profit in this state, and the acceptance of any such pass or ticket by a member of the legislature, or any public officer other than railroad commissioner, shall work a forfeiture of his office."

We do not think the term "public messenger," as used in the act in question, applied to or conferred any rights upon the plaintiff as county treasurer of the county of Santa Clara.

It only remains to inquire whether or not defendant, as a common carrier, was derelict in duty in refusing to permit plaintiff, upon offer of compensation therefor, to carry his money in the baggage-car as freight, he retain-

ing the custody thereof, such car being used by Wells, Fargo & Co. as a receptacle for its express matter by consent of the defendant.

Defendant was, at the date of the alleged refusal, according to the averments of the complaint, "engaged in and carrying on the business of a common carrier of passengers and freight for hire, by cars," etc., "over its railroad."

"A common carrier must, if able to do so, accept and carry whatever is offered to him at a reasonable time and place of a kind that he undertakes or is accustomed to carry." (Civ. Code, sec. 2169.)

"A common carrier must not give preference, in time, price, or otherwise, to one person over another," etc. (Civ. Code, sec. 2170.)

A common carrier of goods is not under obligation to accept and carry all personal property that may be offered. That class of carriers known as transfer companies, engaged in receiving and transferring the baggage of passengers to and from public conveyances by land and water, are under no obligation to accept and carry ordinary merchandise. A parcel-delivery express company need not receive and deliver hay, lumber, or other articles too bulky, heavy, or otherwise inconvenient to handle and transfer by its usual facilities.

In other words, the duty of the carrier is confined, as is provided by our code, to accepting and carrying property "*of a kind that he undertakes or is accustomed to carry.*"

The defendant did not undertake—that is to say, did not promise or agree—to carry defendant's money; indeed, it was not asked to do so, except to permit the plaintiff to retain charge of and carry it in the car, and there is nothing in the complaint showing or tending to show that defendant was *accustomed to carry, or ever did carry, or offer to carry*, money as freight or baggage; on the contrary, the express averments of the complaint are to the effect "that the defendant has always refused to

receive money as freight for transportation " over this route, or to allow any person to travel and carry money on its freight-cars, or to check and carry money as baggage on its passenger-cars.

The problem is therefore practically narrowed to a consideration of this question: —

Defendant had accorded to Wells, Fargo & Co. the privilege of carrying in its baggage-car property of the same kind with that possessed by the plaintiff, and of retaining possession thereof while in transit.

Under the circumstances presented by the complaint, was it the duty of defendant to extend like facilities to the plaintiff?

The express business, as understood and carried on in the United States, is said to have been inaugurated by Alvin Adams in the year 1839. It at first involved the carriage of small packages of value between important cities, and proving convenient to the public and remunerative to those engaged in the business, it gradually expanded in volume and importance, until upon all the great thoroughfares of the country, whether by land or water, one or more companies was to be found engaged in the receipt, carriage, and delivery of property varied in character, and including that of great value in small compass, articles requiring special care to protect them from injury or theft, perishable goods requiring speedy transit and immediate delivery, and a variety of others, all known as "express matter."

The business has continued to increase until it has become a prime factor in satisfying the wants of advancing civilization, and has demanded and received from transportation companies the facilities essential to its importance and successful execution. Among these are the allotment of express-cars, and space in baggage-cars attached to passenger trains, for the speedy transportation of this class of freight by railroad companies, and the transportation of messengers, the employees of the

express companies, in whose custody and possession the property is retained during transit.

The duties of railroad carriers are confined to the receipt, carriage, and delivery of such freights as are appropriate to such a mode of transportation, and in the absence of some special provision in their charter or in the law under which they are organized, railroad companies are not bound as carriers of property to receive and carry money, gold or silver bullion, bonds, bank notes, jewelry, valuable papers, or other property not appropriate to the mode of transportation in vogue by such companies. (*Southern Ex. Co. v. Nashville R'y Co.*, 20 Am. Law. Reg. 596.)

Doubtless, the growth and expansion of the express business is largely due to the fact that its successful conduct calls for the exercise of powers and furnishing of facilities not possessed in any ample degree by railroad carriers.

Be this as it may, the express business, as was said in *Southern Ex. Co. v. Nashville R'y Co.*, 20 Am. Law. Reg. 598, "is only second in importance to railroad transportation; and that the express business has so interwoven itself into the present methods that it cannot be dispensed with without producing an abrupt and disastrous revulsion in the present mode of carrying on trade. It has grown into immense proportions, and has become a necessity. . . . It has attained its present enlarged usefulness under the fostering care of the railroads themselves. . . .

"The right of the public to have quick, reliable, and safe carriage of goods through expressmen has been recognized for forty years. This general recognition by the public and by railroad corporations, in connection with its admitted utility, stamps it as a legitimate mode of railroad carriage."

The carriage of such freights for express companies is demanded by the wants of the public, and is in the strict line of railroad duty.

An application of the principle which involves the duty of railroad companies to avail themselves of the discoveries of modern science and skill for the safe and speedy transportation of passengers and freight may well require them to so adjust their facilities for accommodating the public that its advancing wants may be supplied, and the mutual interests of all parties may be subserved.

The defendant has recognized and discharged this duty so far as to accord to Wells, Fargo & Co. all necessary facilities for conducting an express business over its railroad.

Having thus provided for the accommodation of the public with express facilities, the contention of defendant is, that the full measure of its duty is discharged, and that to require it to extend to each individual who may apply and be willing to pay therefor like facilities would, owing to the peculiar requirements demanded, be subversive of legitimate trade, impose upon defendant burdens not easily borne, and in no wise benefit individuals demanding such privileges.

It does not appear from the complaint that the sum charged by Wells, Fargo & Co. for the transportation of his money was in excess of the value of the service rendered, or in excess of the sum which might reasonably have been exacted from him by defendant had it permitted him to retain possession of his money, and to travel with it in the baggage-car, devoted in part to express matter.

If, therefore, plaintiff has been injured and damaged, it must be upon the principle that he, in common with all other persons, had a right to possession of his property while in transit, and to all the privileges and facilities extended to the express company for the transportation of like property.

This question was involved in three cases recently presented to the Supreme Court of the United States.

and decided by that tribunal, known as the express cases, and severally entitled: *St. Louis, I. M., & S. R'y Co. v. Southern Express Co.*; *Memphis & L. Rd. Co. v. Southern Express Co.*; and *Missouri, K., & T. R'y Co. v. Adams Express Co.*, 117 U. S. 1.

These causes were each brought by an express company against a railway company to compel the latter to afford it the same express facilities it had formerly enjoyed under a contract then abrogated.

The several circuit courts from which the cases were appealed had each entered a decree in favor of the express companies, in which it was held, among other things:—

“1. That the express business is a branch of the carrying trade, that has by the necessities of commerce and the usages of those engaged in transportation become known and recognized so as to require the court to take notice of the same, as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

“2. That it has become the law and usage and is one of the necessities of the express business that the property confided to an express company for transportation should be kept while in transit in the immediate charge of the messenger or agent of such express company.

“3. That to refuse permission to such messenger or agent to accompany such property on the steamboats or railroads on which it is to be carried, and to deny to him the right to the custody of the property while so carried, would be destructive of the express business, and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents.

“7. That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent

and upon the same trains that said defendant may accord to itself or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to the plaintiff on all its passenger trains."

The Supreme Court, in the opinion delivered by Chief Justice Waite, reviews the growth and importance of the express business, recognizes the fact that it could not be destroyed without interfering materially with business and the conveniences of social life, refers to the fact that railway companies recognize the right of the public to demand transportation facilities by the railways which the public has permitted to be created of that class of freight known as "express matter," and then proceeds to show the inconveniences that would follow were the railroad companies obliged to furnish express facilities to all applying for them, its interference with passenger traffic, and concludes that "the railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodation.

"If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security." And holds that in the absence of a usage to that effect, or of some statute requiring them so to do, it is not the duty of railroad companies to furnish express facilities to all alike who demand them.

The inconveniences which would follow from requiring railroad companies to extend equal express facilities to all persons, companies, and corporations regularly engaged in the express business would be multiplied beyond measure were they, either with or without previous notice, required to furnish like accommodations to each indi-

vidual who might at any time, and for a single trip, see fit to demand them.

Railroad companies owe important duties to the public, the discharge of which in their letter and spirit should be rigorously enforced by every department of the government to which authority in the premises is delegated, but to uphold the claim of plaintiff would establish a principle onerous to railroad companies and at the same time detrimental to the speedy and orderly conduct of a branch of the carrying trade in which the public is most concerned.

We are of opinion the demurrer to plaintiff's complaint was properly sustained, and that the judgment should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 11520. Department Two.—July 20, 1886.]

IN THE MATTER OF THE ESTATE OF AUGUSTIN
OLIVERA, DECEASED.

ESTATE OF DECEDENT — CLAIM AGAINST BEARS INTEREST AFTER SETTLEMENT OF ACCOUNT. — A claim against the estate of a deceased person, which has been passed upon on the settlement of the final account of the administrator, and ordered to be paid in due course of administration, has the effect of a judgment against the estate, and bears interest at the rate of seven per cent per annum from the date of the decree settling the account, although the demand on which the claim was founded did not bear interest.

APPEAL from a judgment of the Superior Court of Los Angeles County settling the account of an administrator.

The facts are stated in the opinion of the court.

Bicknell & White, for Appellant.

Smith, Brown & Hutton, for Respondent.

MCKEE, J.—On settlement of the final account of the administration of the estate in this case, it appeared that five claims had been presented to the administrator, which were allowed and approved, and were afterward, by a decretal order of the Probate Court, entered on the 11th of February, 1878, "ordered to be paid in due course of administration." One of the claims was for the amount of a promissory note, bearing interest at the rate of one and one half per cent per month, compounded, and the other four were for balances due upon current accounts, without interest.

On the 21st of October, 1885, the administrator paid the claimant the principal and interest due upon the claim based on the note, and the principal of the sums due upon the claims based on the accounts. But upon the last the claimant demanded interest from the 11th of February, 1878, which the administrator refused to pay unless the court allowed it.

The estate is solvent, and the administrator has sufficient moneys of the estate in hand to pay the principal and interest of all claims against the estate.

The court decided that the claimant was not entitled to interest upon the claims based on the accounts, and disallowed it on the ground that they did not bear interest. From the judgment the claimant appeals.

Undoubtedly the claimant was not entitled to recover interest upon the original accounts, for the reason that there was no rate of interest charged in them. But the accounts were merged in the decretal order of the 11th of February, 1878, which ordered them to be paid in due course of administration. That order had the force and effect of a judgment against the estate (Code Civ. Proc., sec. 1504; *Hidden's Estate*, 23 Cal. 369); and under the code law, interest is payable at the rate of seven per cent per annum on all judgments recovered in

the courts of this state (Civ. Code, **sec.** 1917; *White v. Lyons*, 42 Cal. 279); therefore the claimant was entitled to be paid interest upon the claims from the date of the judgment upon them.

Judgment reversed, and caused remanded for further proceedings.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 11491. Department One.—July 21, 1886.]

ALBERT M. JOHNSON, ASSIGNEE OF JACOB KAERTH,
AN INSOLVENT, RESPONDENT, *v.* A. R. KLEIN, APPELLANT.

PRACTICE — FINDINGS — SUFFICIENCY OF. — A finding that all the averments of a complaint are true is a sufficient finding of facts, if the answer contains nothing but denials and an admission of matters alleged in the complaint.

APPEAL from a judgment of the Superior Court of Sacramento County.

The action was brought to recover the proceeds of an execution sale of certain goods belonging to the assignor of the plaintiff, on the ground that the judgment under which the sale was made was obtained through the fraudulent collusion of the defendant and the assignor, and was in fraud of the creditors of the latter. The findings were that all and singular the averments of the complaint are true. The further facts are stated in the opinion of the court.

Taylor & Holl, for Appellant.

Freeman, Johnson & Bates, for Respondent.

Ross, J.—It has been so often held here that a finding that all the averments of the complaint are true is a sufficient finding of facts that an appeal grounded on its

alleged insufficiency must be held to have been taken for delay. The answer contained nothing but denials and an admission of matters alleged in the complaint, so that the finding that all of the allegations of the complaint are true necessarily covers all of the issues made by the pleadings.

Judgment affirmed, with fifty dollars damages.

McKINSTRY, J., and MYRICK, J., concurred.

[No. 11198. Department One.—July 21, 1886.]

S. L. RICHARDS ET AL., APPELLANTS, *v.* C. H. SHEAR ET AL., RESPONDENTS.

HOMESTEAD — MATERIAL-MEN CANNOT OBTAIN LIENS ON. — Under section 1241 of the Civil Code, one who furnishes materials for the construction of a building on real property after it has been impressed with a homestead cannot obtain a lien thereon for the materials furnished.

APPEAL from a judgment of the Superior Court of Sacramento County.

The action was brought to enforce the lien of a material-man. Judgment was rendered in favor of the defendants. The further facts are stated in the opinion of the court.

Freeman, Johnson & Bates, for Appellants.

Armstrong & Hinkson, for Respondents.

Ross, J.—It is sought in this case to charge the homestead of the defendants, who are husband and wife, with a lien for materials furnished by the plaintiffs to the husband to be used and which were used in the construction of a building thereon,—the materials having been furnished after the property had been impressed with the homestead character.

Sections 1240 and 1241 of our Civil Code read:—

“ Sec. 1240. The homestead is exempt from execution or forced sale, except as in this title provided.

“ Sec. 1241. The homestead is subject to execution or forced sale in satisfaction of judgments obtained,—

“ 1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises;

“ 2. On debts secured by mechanics', laborers', or vendors' liens upon the premises;

“ 3. On debts secured by mortgages on the premises, executed and acknowledged by the husband and wife, or by an unmarried claimant;

“ 4. On debts secured by mortgages upon the premises, executed and recorded before the declaration of homestead was filed for record.”

It is said for the appellants that it was not the intent of the legislature to subject the homestead to execution or forced sale in satisfaction of judgments obtained on debts secured by the liens of mechanics and laborers who perform manual labor in and about the building, and withhold such privilege from the men who furnish the materials therefor. We can see great force in the suggestion of Mr. Thompson, in his work on Homesteads and Exemptions, sec. 312, that there is no difference in principle between a debt due to A, who has provided me with the land on which I have erected my building, and a debt due to B, who has furnished the materials to build it, and a debt due to C, whose labor has built it. But where the legislature has undertaken to deal with the subject, and has declared from what the homestead shall be exempt and with what it shall be charged, it only remains for the courts to give effect to its provisions. Admittedly, the language of the section of the code specifying in what instances the homestead shall be subject to execution and forced sale does not include the liens of material-men. The language is, in satisfaction of judgments “on debts secured by mechanics', laborers',

or vendors' liens upon the premises." The chapter of the Code of Civil Procedure which provides for liens of the nature of that claimed by the plaintiffs is headed "Liens of mechanics and others upon real property," and gives to "mechanics, material-men, contractors, subcontractors, artisans, architects, machinists, builders, miners, and all persons and laborers of every class performing labor upon or furnishing materials to be used in the construction," etc., a lien, etc. (Code Civ. Proc., sec. 1183.)

The section of the Civil Code first above cited does not provide that the homestead shall be subject to all the liens authorized to be created under the chapter of the Code of Civil Procedure headed "Liens of mechanics and others," but subjects it only to two classes of those liens, to wit, "mechanics' and laborers'" liens. The latter terms no more include the liens of material-men than they do those of architects or contractors or subcontractors.

The findings sufficiently show that the property in question constitutes the homestead of the defendants. There is no presumption that it was so used as to defeat the object for which it was dedicated. (*Holden v. Pinney*, 6 Cal. 234.)

Judgment affirmed.

McKINSTRY, J., and MYRICK, J., concurred.

[No. 11484. Department Two.—July 21, 1886.]

JOHN J. CHARNOCK, RESPONDENT, *v.* ANDERSON
ROSE ET AL., APPELLANTS.

WATERCOURSES — RIGHTS OF PRIVATE OWNERS — ACT OF MAY 15, 1854. — The act of May 15, 1854, creating a board of commissioners and the office of overseer in each township of the several counties of the state to regulate watercourses within their respective limits, and the acts amendatory thereof, do not authorize those

officers to enter upon private watercourses, and to disturb the owners thereof in their use and enjoyment.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

Wells, Van Dyke & Lee, for Appellants.

Howard & Scott, for Respondent.

MCKEE, J.—This is an appeal from a judgment which perpetually enjoins the defendants from interfering in any way with the possession, use, and control of a ditch in which is conducted, for the purpose of irrigation, the water of a natural watercourse on the plaintiff's land.

The watercourse is known as the Bellona Creek, which rises on private property above the Bellona Ranch, in Los Angeles County, and has "from time immemorial flowed through the ranch."

It appears that prior to the year 1850 the owners of the ranch constructed two ditches, by which they diverted and conducted the water of the creek to the irrigable lands of the ranch. In that way they occupied and used the ranch until the year 1868, when it was, by judicial proceedings, partitioned among them, and in the partition there was allotted to them respectively certain parts of the irrigable lands in proportion to their respective interests in the ranch, and assigned, as appurtenant to each allotment, a proportionate right to the use of the water of the creek running in the ditches.

Having become the owner of two of those allotments and the water right appertaining to them, the plaintiff entered into possession, and exercised his rights of ownership and possession, unchallenged by any one, until February, 1885, when the defendants, without his consent or permission, entered upon the ditches, and claiming the right to appropriate the water running in them, assumed the use and control of the same.

This entry was not made by the defendants upon any personal claim of private ownership to the property. They do not assert any right to the land or the water founded upon grant or appropriation, nor do they question the private ownership of the plaintiff to both land and water; but admitting that he is the owner of the property, they say that they entered upon it and assumed to use and control it in the exercise of authority conferred upon them by an act of the legislature entitled "An act creating a board of commissioners and the office of overseer in each township of the several counties in the state, to regulate watercourses within their respective limits," approved May 15, 1854, and the acts amendatory thereof.

The plaintiff denies that the statute conferred any power upon the defendants as a board of water commissioners or otherwise to enter upon his property and deprive or disturb him in its use and enjoyment; and that, even if that was the purpose of the statute, it was wholly ineffectual for such purpose, and has been repealed.

Undoubtedly the legislature has no power to expropriate the property of any person by a mere legislative enactment. That the legislature could not do without violating the first principles of constitutional law. Under the constitution and laws of the state, framed to secure and protect every citizen in his rights of life, liberty, and property, private property cannot be taken, except for a public use, upon payment to the owner of a just compensation therefor, ascertained and adjudged to him according to law.

Indeed, the statute itself invoked by the defendants to justify their attempted appropriation of the property of the plaintiff contains provisions declaratory of those first principles of law, for it provides:—

"Sec. 9. Where water rises on land owned by any person, it shall not be subject to the provisions of this act."

"Sec. 14. No person or persons shall divert the waters of any river, creek, or stream from its natural channel to the detriment of any other person or persons located below them on such stream." (Stats. 1854, p. 76.)

Subject to these provisions for the security and protection of private property and its incidents, the object of the statute was the election of township officers to regulate and control the watercourses of the county. For that purpose it authorized the commissioners elected under its provisions to examine and divert such watercourses as they might adjudge ought to be appropriated to public use, and apportion the water thereof among the inhabitants of their districts, and determine the times for using the same. (Stats. 1862, p. 235.)

But at the time of the defendants' entry, the entire subject-matter of the statute, so far as it related to Los Angeles County, had been revised by the legislature by an act entitled "An act to promote irrigation in the county of Los Angeles," approved March 10, 1874. (Stats. 1873-74, p. 312.) Instead of a board of water commissioners and an overseer for each township in the county, as provided by the statute of 1854, the statute of 1874 provided that there should be elected at the general election of 1875 a superintendent of irrigation for the county at large, and three water commissioners in each water district, whose duty should be to acquire water rights by condemnatory proceedings, regulate the watercourses of the districts, and fix water rates for the sale of water for purposes of irrigation.

These provisions were in some respects additional to and in others in conflict with those of the statute of 1854 upon the same subject-matter. Manifestly, therefore, the statute of 1874 was intended as a substitute for the statute of 1854 as to Los Angeles County. Where that is the case with two statutes, the latter or substituted statute repeals the former. (*Treadwell v. Yolo County*, 62 Cal. 564; *People v. Lon Me*, 49 Cal. 353.)

Besides, the statute of 1874 expressly repealed all acts and parts of acts inconsistent with the provisions of the act, so far as they referred to Los Angeles County. (Stats. 1874, sec. 14, p. 312.)

Judgment affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 20201. In Bank.—July 21, 1886.]

THE PEOPLE, RESPONDENT, *v.* CHARLES LOWREY,
APPELLANT.

CRIMINAL LAW — VIEW OF LOCUS IN QUO — CANNOT BE MADE IN ABSENCE OF DEFENDANT — CONSTITUTIONAL LAW. — In a criminal prosecution, the defendant is deprived of his constitutional right of appearing and defending in person, and of being confronted with the witnesses against him, if the jury, under the direction of the court, view the *locus in quo* without the presence of the defendant.

ID. — BURGLARY — POSSESSION OF STOLEN ARTICLES — EVIDENCE. — On a trial for burglary, evidence is admissible that articles in the house burglarized on the night of the burglary were found in the possession of the defendant on the following morning several miles from the place where the crime was committed.

APPEAL from the judgment of the Superior Court of Amador County, and from an order refusing a new trial.

The defendant was convicted of burglary in the second degree. Pending the trial, the jury, under the direction of the court, visited the premises alleged to have been burglarized, the defendant not being present when the view was made. This the defendant claimed deprived him of the right secured to him by the constitution of appearing and defending in person, and of being confronted with the witnesses against him. The further facts are stated in the opinion of the court.

Rust & Caminetti, for Appellant.

Attorney-General Marshall, William J. McGee, and E. C. Farnsworth, for Respondent.

Ross, J.—The judgment in this case must be reversed upon the authority of *People v. Bush*, 68 Cal. 623, decided since the trial of this case in the court below. Anticipating the result, counsel on both sides have asked the court, in the event a new trial should be ordered, to decide whether or not the evidence in the case is sufficient to sustain the verdict. We do not think it proper to do so, for if we should decide that it is, such determination might and probably would be used on the new trial to the prejudice of the defendant.

One other question we are asked to determine, and as that relates to the admission of certain shoes in evidence, it is proper that it should be decided. The crime charged against the defendant is burglary, and the evidence against him circumstantial. There was evidence tending to identify the shoes, and that they were in the house burglarized, and were found in the possession of defendant the next morning some miles from the place where the crime was committed. All this was clearly admissible as tending to connect defendant with the offense.

Judgment and order reversed, and cause remanded for new trial.

MCKEE, J., MYRICK, J., THORNTON, J., SHARPSTEIN, J., and MCKINSTRY, J., concurred.

[No. 11232. In Bank.—July 22, 1886.]

WING HO, APPELLANT, *v.* E. J. BALDWIN, RESPONDENT.

PARTNERSHIP — PUBLICATION OF CERTIFICATE — ASSIGNEE MAY MAINTAIN ACTION WITHOUT. — The sections of the Civil Code prohibiting persons doing business as partners from maintaining any action upon or on account of any contracts made or transactions had in their partnership name, until they have filed and published a certificate showing the names and residences of all the members of the partnership, does not preclude the assignee of such partners from maintaining an action thereon.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The action was brought to recover a balance on account alleged to be due by the defendant to a partnership, and by the latter assigned to the plaintiff. The answer contained a general denial and a plea in abatement on the ground of the failure of the partnership to file and publish a certificate showing the names and residences of the members composing the firm. The court sustained the plea, and rendered judgment in favor of the defendant. The further facts are stated in the opinion of the court.

Thomas B. Brown, for Appellant.

Wells, Van Dyke & Lee, for Respondent.

Ross, J.—The sole question in this case is, whether or not the provision of the Civil Code to the effect that persons doing business as partners, contrary to the provisions of the article requiring the filing and publishing of a certificate showing the names and residences of all the members of the partnership, "shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name, in any court of this state, until they have first filed the certificate and made the publication herein required," also precludes the *assignee* of such persons from maintaining an action thereon. It is claimed that it does, because of the general rule that the assignee of a chose in action acquires no greater rights than his assignor had. But the disability created by the statute is of a personal character, and as applied to the *partnership* operates only to abate the action. (*Byers v. Bourret*, 64 Cal. 73; *Sweeney v. Stanford*, 67 Cal. 635.) The partners may at any time remove the disability by complying with the provisions of the statute. But an assignee of such partners

cannot do so, nor is there any mode by which he can compel them to remove it. The statute does not in terms apply to the assignee of such persons, and to extend it by construction to the assignee would be to place the latter in a worse position than his assignor; for, as already said, it would lie in the power of the partners to remove the disability, while their assignee could not do so. As the language of the statute does not include the latter, we do not think it should by construction be extended to them. (*Cheney v. Newberry*, 67 Cal. 635.)

Judgment reversed and cause remanded.

MCKINSTRY, J., SHARPSTEIN, J., and MCKEE, J., concurred.

MYRICK, J., dissented.

[No. 11168. Department One.—July 23, 1886.]

ELLEN M. WILSON, RESPONDENT, *v.* W. H. PROUTY,
APPELLANT.

CHATTTEL MORTGAGE — GROWING CROP — TORTIOUS REMOVAL DOES NOT DESTROY LIEN — CONVERSION. — The lien created by a duly recorded chattel mortgage on a growing crop is not destroyed by the tortious removal of the crop from the land of the mortgagor by a third person having constructive notice of the lien. In such a case, section 2972 of the Civil Code does not apply, and the mortgagee may maintain an action against the person removing the crop for its conversion.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The action was brought to recover damages for the conversion of a growing crop on which the plaintiff held a chattel mortgage. Judgment was rendered in favor of the plaintiff. The further facts are stated in the opinion of the court.

Grove L. Johnson, for Appellant.

Freeman & Bates, for Respondent.

Ross, J.—The case shows that the plaintiff leased to one McCafferty a tract of land, upon which he planted a crop of barley, and upon which crop he executed to plaintiff a chattel mortgage, which was duly recorded. After the crop was harvested, and while it yet remained upon the land on which it was grown, McCafferty, who was indebted to the defendant, turned over to the latter a certain portion of it, which portion defendant caused to be hauled away and converted to his own use.

It is contended for the appellant that, in so far as the barley in question is concerned, the lien held by the plaintiff terminated upon its removal from the land upon which it was grown, by virtue of section 2972 of the Civil Code, which reads: "The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor." It was held in *Martin v. Thompson*, 63 Cal. 4, that there is nothing in this language which demands such construction as that the lien shall be lost as a consequence of the tortious removal of the crop by a third person. In the present case, defendant, who at least had constructive notice of plaintiff's lien, went upon the land on which the grain was grown, and upon which it then was, and upon which grain there was then a valid subsisting lien in plaintiff's favor, and himself caused the grain to be removed from the land and converted. He could not thus destroy the lien of plaintiff. In principle the case is covered by that of *Martin v. Thompson, supra*.

The lien continuing, there can be no doubt of the plaintiff's right to maintain the action for the conversion. (Jones on Chattel Mortgages, sec. 445, 490.)

Judgment and order affirmed.

McKINSTRY, J., and MYRICK, J., concurred.

[No. 11416. Department One.—July 23, 1886.]

L. S. ADAMS ET AL., RESPONDENTS, *v.* SOUTH BRITISH AND NATIONAL FIRE AND MARINE INSURANCE COMPANIES OF NEW ZEALAND, APPELLANT.

FIRE INSURANCE — POLICY — CONDITIONS FOR ARBITRATION — PREMATURE ACTION — The action was brought upon a policy of fire insurance to recover the amount of a loss. The policy contained certain conditions and stipulations, quoted in the opinion, which provided in effect that if the amount of the loss could not otherwise be adjusted to the satisfaction of the parties, it should be adjusted by a mode of arbitration therein prescribed, and that until such adjustment, or a fair effort on the part of the insured to obtain it, no action could be maintained by the insured to recover for a loss. No arbitration or award to determine the amount of the loss in question was ever had, nor any demand made therefor by the insured. *Held*, that the action could not be maintained.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The policy in question was issued by the defendant to one I. H. Locey, the assignor of the plaintiffs. Subsequent to the fire, differences arose between the insured and payees under the policy on the one hand, and the defendant on the other, touching the amount of the loss. No arbitration or award to determine the amount was ever had, nor any demand made therefor by the insured or the plaintiffs. On the trial, the defendant asked the court to instruct the jury that the action could not be maintained because of such failure. The court refused to give the instruction, to which the defendant excepted. Judgment was rendered in favor of the plaintiffs. The further facts are stated in the opinion of the court.

T. C. Van Ness, for Appellant.

The instruction requested by the defendant should have been given. (*Old Saucilito L. & D. D. Co.*, 66 Cal. 253; *Holmes v. Richet*, 56 Cal. 307; *Elliott v. Royal Ex-*

(*change Ins. Co.*, L. R. 2 Ex. 241; *Gauche v. London and Lancashire Ins. Co.*, 11 Ins. Law J. 369.)

Freeman & Bates, and *Grove L. Johnson*, for Respondents.

Ross, J.—This is an action upon a policy of fire insurance wherein the defendants agreed that in case of the destruction of or damage to the property insured by fire they would pay to the plaintiffs the amount of such loss or damage, not exceeding the amount in the policy mentioned, "provided always that this insurance shall at all times and under all circumstances be subject to the following conditions and stipulations, which conditions and stipulations constitute the basis of this contract, and are to be considered as incorporated in and forming part of this policy."

Among the conditions and stipulations referred to are the following:—

"4. In case of loss, the assured shall give immediate notice thereof, and shall render to the companies a particular account of said loss, under oath, stating the time, origin, and circumstances of the fire; the occupancy of the building herein described; other insurance, if any, and copies of the written portion of *all policies*; the whole cash value and ownership of the property, and the amount of loss or damage; and shall produce, if required, the certificate of the chief of the fire department, or his assistant (or if there be no such official, then the certificate under seal of a magistrate, notary public, or commissioner of deeds, doing business nearest the place of the fire), not concerned in the loss or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property herein described to the amount claimed by the

said assured. The assured shall, if required, submit to examinations under oath either before or after furnishing the proofs herein required, by any person appointed by the companies, and shall answer all questions relating to the alleged loss or damage, and to their claims therefor, and subscribe to such examinations when reduced to writing; and shall also produce their books of account, invoices, and inventories, and other vouchers, and exhibit the same for examination at the office of the companies, and permit extracts and copies thereof to be made. The assured shall also produce certified copies of all bills and invoices the originals of which have been lost or destroyed; and shall also exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination to any person or persons named by these companies. In no case shall the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire, nor shall the assured be entitled to recover under this policy any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether the such other insurance be by specific or by general or floating policies. Assignors, unless the assignee owns the property, must make the proofs hereby required. And if there appear any fraud or false declaration, or that the fire shall have happened by the procurement or willful act, means, or connivance of the assured or claimants, or that the assured failed to use his best endeavors in saving and protecting the property from damage at and after the fire, he, she, or they shall be excluded from all benefit under this policy.

"5. In case differences shall arise touching any loss or damage, the matter shall, at the written request of either party, be submitted to two impartial appraisers, mutually chosen (who, in case of disagreement, shall choose a third), and whose detailed estimate, made in writing and signed by any two of them, under oath, shall,

as to the amount of such loss or damage only, be binding on both parties, but shall not decide the liabilities of these companies on this policy."

"11. It is further expressly covenanted by the parties hereto that no suit or action for the recovery of any claim by virtue of this policy shall be sustained in any court until after an award shall have been demanded and obtained, fixing the amount of such claim in the manner above provided."

The language of the stipulations brings the case within the principle of the case of *Old Saucilito Land & D. D. Co. v. Commercial Union A. Co.*, 66 Cal. 253, and of the cases there cited, on the authority of which the judgment and order in the present case must be reversed. Here, as it was in the Saucilito case, the clear meaning of the contract is, that if the amount of loss cannot otherwise be adjusted to the satisfaction of the parties, it shall be adjusted by the mode of arbitration therein prescribed, and that until such adjustment, or a fair effort on the part of the insured to obtain it, no cause of action arose.

Judgment and order reversed, and cause remanded for a new trial.

MCKINSTRY, J., and MCKEE, J., concurred.

[No. 9312. Department Two.—July 23, 1886.]

ALONZO PHELPS, RESPONDENT, *v.* HENRY D. COGSWELL, APPELLANT.

MALICIOUS PROSECUTION — EXCESSIVE DAMAGES. — The action was brought to recover damages for a malicious prosecution in causing the arrest of the plaintiff on a charge of simple assault. The plaintiff, after his arrest, was not confined in jail or subjected to any real hardship or act of oppression, or injured in his business or social standing, and the charge against him was dismissed in the Police Court. A verdict was rendered in favor of the plaintiff for four thousand dollars. Held, that the verdict was excessive, and should be reduced to one thousand dollars.

APPEAL from an order of the Superior Court of the city and county of San Francisco refusing a new trial.

The facts are stated in the opinion.

Henry E. Highton, for Appellant.

Fox & Kellogg, for Respondent.

FOOTE, C.—This action was for malicious prosecution.

The plaintiff, Phelps, it appears, was arrested by a police officer of the city of San Francisco, under a warrant which was issued under a complaint verified by Cogswell, charging the former with having assaulted him on a street of said city. In making this arrest, the officer went to a dwelling-house, where the plaintiff in the present action was then sojourning with his wife, and informed him that he would have to accompany him (the officer) or procure and give bail for his appearance to answer the charge thus made against him.

The plaintiff, with the officer, proposed to proceed to Bancroft & Co.'s place of business, in order to procure money to deposit as bail. The officer, objecting, said that it was too late in the evening to go there, and that he would wait for the deposit of the amount of the bail until the following Monday. Upon that day, so fixed, the plaintiff obtained the money needed, and handed it to the officer. Afterwards the former appeared twice in the Police Court, prepared to meet the accusation against him and to go to trial thereon. Upon neither of these occasions did the defendant appear; and upon the last one the charge was dismissed.

The plaintiff was never put in jail, or subjected to any real hardship or act of oppression.

The charge made, that of assault, was not at all infamous in its nature, nor does it appear seriously to have injured the plaintiff in his business affairs or in the estimation in which, as a gentleman and an honest man,

he had been previously held by his friends and acquaintances.

The jury by their verdict found, as they had a right to do, upon a conflict of testimony, that the defendant had no probable cause to have the plaintiff arrested as he did. They must also have found, under the trial court's instructions, that the defendant was actuated by actual malice, and although upon the evidence we would perhaps have come to a different conclusion as to that matter, yet we do not feel warranted in altogether setting aside their verdict, as being upon that issue entirely unwarranted by the evidence.

Yet we feel constrained to say that this case is by no means on a parallel as to the features which it discloses with that of *Russell v. Dennison*, 45 Cal. 338-341. That was an aggravated case of willful, open, malicious oppression, which carried with it wrong, injury, and great bodily and mental suffering to the victim of a man's vile displeasure, and the judgment was afterwards reduced. (50 Cal. 243.)

No such elements appear in this case. The plaintiff was accused of no moral turpitude, he was subjected to no physical suffering, he received no large damage to his business or property, and a reasonable man should not have experienced any very poignant and overwhelming sorrow and laceration of feeling at an arrest on a mere charge of simple assault where the party making the charge did not appear to press it, and the officer of the law dismissed it in a reasonable time, and plaintiff's friends met him with merely a smile or word of gentle pleasantry.

We are of opinion that there was no error in the charge of the court to the jury, or in any other ruling by that tribunal on the trial.

The court below granted defendant's motion for a new trial unless the plaintiff would consent to release three thousand five hundred dollars of the verdict, which was

for seven thousand five hundred dollars. The plaintiff remitted the sum as required, and the new trial was denied. From this order defendant appealed.

Under the facts of the case as they appear in the record, we think that the verdict, when reduced as above, was excessive, and that it should be reduced to the sum of one thousand dollars.

Unless the plaintiff shall consent, within thirty days after the filing of the *remittitur* herein from this court in the court below, to release all but one thousand dollars of such verdict, the order denying a new trial should stand reversed and a new trial be granted. If such consent of plaintiff is filed as required above, then a new trial should be denied.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT.—The foregoing is approved, and the clerk of this court will enter the order as above indicated; and the court below, after the filing therein of the *remittitur*, will make such orders as shall become necessary to carry out the directions of this court.

[No. 20099. In Bank.—July 23, 1886.]

THE PEOPLE, RESPONDENT, *v.* DAVID LAMPSON,
APPELLANT.

CRIMINAL LAW — CONTINUANCE OF TRIAL — ABSENCE OF WITNESS
— AFFIDAVITS MUST SHOW ISSUANCE OF SUBPOENA. — The refusal to continue the trial of a criminal case on the ground of the absence of a material witness for the defendant, who resides out of the county in which the trial is had, is not error, if the affidavits for continuance fail to show that a subpoena for the witness, having indorsed thereon an order of the trial judge for his attendance, was ever issued.

APPEAL from a judgment of the Superior Court of Calaveras County.

The defendant was tried and convicted of a felony in the Superior Court of Calaveras County. The witness on account of whose absence the continuance was asked resided in the city and county of San Francisco. The further facts are stated in the opinion of the court.

Reddick & Solinsky, and Wesley K. Boucher, for Appellant.

Attorney-General Marshall, for Respondent.

Ross, J.—The only point relied on for a reversal of the judgment in this case is the refusal of the court below to grant the defendant a continuance of the trial. It appears from the bill of exceptions that on the 6th of April, 1885, the case was set for trial on the 4th of May following. At the time thus fixed, the defendant moved for a continuance, on the ground that a material witness on his behalf—one Mrs. Cook—was absent. In support of the motion, he filed his own affidavit and that of one of his counsel. The affidavits failed to show that proper diligence was used to procure the attendance of the witness. No such subpoena as would compel the attendance of the witness was ever issued at all, and it does not appear that the sheriff of the city and county of San Francisco was informed of the address of the witness, that he might serve the subpoena that was issued. It is provided by section 1330 of the Penal Code that “no person is obliged to attend as a witness before a court or magistrate out of the county where the witness resides or is served with the subpoena unless the judge of the court in which the offense is triable, or a justice of the Supreme Court, or a judge of the Superior Court, upon an affidavit of the district attorney or prosecutor, or of the defendant or his counsel, stating that he believes the evidence of the witness is material, and his attendance at the examination or trial necessary, shall indorse on the subpoena an order for the attendance of the witness.”

The excuse given in the affidavit of the defendant for the failure to obtain the order provided for in the statute is that the superior judge of the county was absent therefrom during the week prior to April 26th. But the affidavit shows that the only subpoena that was issued was issued on the 28th of April, which was subsequent to the expiration of the period during which the judge was absent. There was ample opportunity, both before and after that period, for the procurement of the subpoena required by the statute, and the failure to obtain it was a want of due diligence.

Judgment affirmed.

MCKINSTRY, J., MYRICK, J., THORNTON, J., and SHARSTEIN, J., concurred.

[No. 11510. Department Two.—July 26, 1886.]

LONG BEACH LAND AND WATER COMPANY,
APPELLANT, *v.* SOLOMON RICHARDSON ET AL.,
RESPONDENTS.

SEASHORE — OWNER OF ADJOINING LAND TAKES TO HIGH-WATER
MARK — PRESUMPTION. — In the absence of evidence to the contrary, it is presumed that the owner of land bordering on the seashore holds only to ordinary high-water mark, and that all the seashore fronting his land lying between high and low water mark is the property of the state.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

R. M. Widney, and C. W. Pendleton, for Appellant.

Wells, Van Dyke & Lee, for Respondents.

McKEE, J.—This was an action of forcible entry and detainer against the parties defendants, who were charged

with having forcibly entered upon about twenty feet square of the seashore of which, it was alleged, the plaintiff was in the exclusive possession at the time of the entry. The entry was made on the twenty-seventh day of July, 1885.

At the trial of the issues made by the pleadings in the case, the court granted a nonsuit, upon the ground that the evidence was insufficient to prove actual and peaceable possession by the plaintiff of the *locus in quo* at the time of the defendants' entry thereon. Whether the court erred in nonsuiting the plaintiff on that ground is therefore the only question presented on the appeal.

From the case as presented by the plaintiff, it appears that the land upon which the defendants entered is part of the seashore in front of a ranch in Los Angeles County known as the Cerritos ranch, which extends from the San Gabriel River on the west, along the beach of the Pacific Ocean for about two miles, to the boundary line of the Alamitos ranch. The plaintiff was in possession of that portion of the ranch lying immediately in front of the ocean, using the land as a "seaside resort," which, in the exercise of corporate powers derived from its articles of incorporation, it had established there two or three years before the entry complained of, and was known by the name of "Long Beach."

In establishing this seaside resort, the company had the portion of the ranch which fronted the ocean surveyed and laid off in streets and blocks for residence purposes and public parks, and a map of the survey made, on which the streets were marked and named, and the blocks for residence purposes subdivided into lots were delineated and numbered. As designated on the map, the streets laid off in the direction of the ocean were not projected to the beach; they ended in a street which was laid off parallel with the beach on the upland above the line of high tide, named on the map "Ocean Park Avenue."

South of the avenue the beach extends irregularly. In the narrowest place it is about three hundred feet to the line of low-water mark; but it gradually widens out until it is about eight hundred feet,— more than a hundred feet of which from low-tide to high-tide lines is covered by the ordinary tides.

On the upland, a considerable distance inland from the beach, the company had built, and at the time of the defendants' entry occupied, a "fine hotel," and on the beach below the upland a bath-house of sixteen rooms, near which were benches for the accommodation and use of patrons and visitors to the hotel; and in connection with this occupation it claimed, and in its corporate capacity exercised, the right to use and control the entire seashore frontage of the ranch for two miles—the tide-covered portion of—as a public bathing-place, and the portion uncovered by the tides as a driveway for carriages, which could be driven onto the beach from Ocean Park Avenue through two or three places in the bluff, which had been cut down to admit of their passage to and from the beach. It had also passed a resolution declaring "that all lands lying south of the south line of Ocean Park Avenue at Long Beach, to extreme low water of the Pacific Ocean, were reserved from sale and kept for the use of the company." In like manner it ordered its agent to prevent "campers" and other persons from taking possession of any part of the beach land by the erection of tents or bath-houses thereon, and to remove from it any such structures as might be put there by any person or persons for any purpose; and from time to time that had been done by the employees of the company.

This was the sum of the evidence given by the plaintiff as to its actual and peaceable possession of the beach at the time of the entry by the defendants.

The evidence was undoubtedly sufficient to prove such an exclusive possession of the ranch by the plaintiff as vested it with the right to maintain ejectment or forcible

entry against persons who may have invaded the possession. But there was no evidence tending to show that the ranch included the seashore in front. The plaintiff did not put in evidence the grant to the ranch; and in the absence of evidence to the contrary, the court below was bound, as this court is bound, to presume that the ranch went no farther seaward than ordinary high-water mark (*United States v. Pacheco*, 2 Wall. 587); and that all the seashore fronting the ranch lying between high and low water mark was the property of the state (Civ. Code, sec. 670), from whom, so far as appears by the evidence, the plaintiff did not claim to have derived any right of possession.

Such being the case, the plaintiff did not merely by its exclusive possession of the Cerritos ranch acquire possession of any lands outside of the ranch lines; and the evidence shows that it had no actual possession of the beach in front of the ranch, except that part of it which was occupied by its bath-house and improvements; but these were five hundred or six hundred feet away from that part of the beach upon which the defendants entered and put up their bath-house. Where the defendants entered, the plaintiff had no actual possession; their entry, although resisted by the servants of the plaintiff, was therefore not an invasion of the plaintiff's possession; and the plaintiff was not entitled to maintain the process of forcible entry or detainer against them. It follows that the plaintiff was properly nonsuited.

Judgment affirmed.

SHARPSTEIN, J., and THORNTON, J., concurred.

Hearing in Bank denied.

LXX. CAL.—14

[No. 11321. Department Two.—July 26, 1886.]

JUAN MATIAS SANCHEZ ET AL., APPELLANTS, *v.* B. NEWMAN ET AL. B. NEWMAN, RESPONDENT.

APPEAL — CONTEMPT PROCEEDINGS. — No appeal lies from an order dismissing a proceeding for an alleged contempt of court.

APPEAL from an order of the Superior Court of Los Angeles County dismissing a proceeding for contempt.

The proceeding was brought to punish the defendant Newman for an alleged contempt in re-entering upon real property from which he had been ejected under a writ of restitution upon a judgment in the case rendered on the 24th of February, 1873. The proceeding was commenced on the 10th of April, 1882. The court dismissed the proceeding on the ground that it was barred by section 336 of the Code of Civil Procedure, and therefore the court had no jurisdiction. The further facts are stated in the opinion of the court.

Glassell, Smith & Patton, for Appellants.

Wells, Van Dyke & Lee, and *J. M. Damron*, for Respondent.

THORNTON, J.—This is an appeal from an order in a proceeding for contempt against one B. Newman. By the order referred to, the proceeding against Newman was dismissed for want of jurisdiction. In *Tyler v. Connolly*, 65 Cal. 28, it was held that there is no appeal from a judgment in a case of contempt. We find nothing in this case which takes it out of the rule laid down in the case cited. For the reasons given in *Tyler v. Connolly*, we are of opinion that there can be no appeal here. The appeal must therefore be dismissed, and it is so ordered.

SHARPSTEIN, J., and MCKEE, J., concurred.

[No. 11583. Department Two.—July 26, 1886.]

CAMILLO TEMPLE ET AL., PETITIONERS, *v.* SUPERIOR COURT OF LOS ANGELES COUNTY ET AL., RESPONDENTS.

CONTEMPT — RE-ENTRY ON LAND AFTER DISPOSSESSION. — Under section 1210 of the Code of Civil Procedure, a defendant in an action to recover the possession of land is guilty of contempt if he re-enters thereon after being dispossessed under the judgment rendered therein, notwithstanding the re-entry was made more than five years after the date of the judgment.

ID. — PROCEEDING TO PUNISH FOR — MANDAMUS TO COMPEL HEARING. — A writ of mandate lies to compel the Superior Court to hear and determine a proceeding, for such a contempt where it refused to hear and has dismissed the proceeding for want of jurisdiction.

PROCEEDING for a writ of mandate to compel the Superior Court of Los Angeles County to hear and determine a proceeding to have one Newman, a defendant in an action brought to recover the possession of certain land, adjudged guilty of contempt for re-entering upon the land from which he had been ejected under an execution issued in the action. The court dismissed the proceeding on the ground that it was barred by section 336 of the Code of Civil Procedure, in not having been commenced within five years after the date of the judgment. The appeal from the order of dismissal is reported *supra*, p. 210. The further facts are stated in the opinion of the court.

Glassell, Smith & Patton, for Petitioners.

J. M. Damron, Wells, Van Dyke & Lee, and Bunson & Wells, for Respondents.

THORNTON, J.—This is an application for a writ of mandate to compel the Superior Court of Los Angeles County, Judge W. A. Cheney presiding, to hear a charge of contempt of court made against one B. Newman, which that court had refused to hear, and has dismissed on the ground of want of jurisdiction.

We have examined the record, and are of opinion that the matter is within the jurisdiction of the court. The facts stated bring the case clearly within section 1210 of the Code of Civil Procedure, and under such circumstances the court cannot, by holding without reason that it has no jurisdiction of the proceeding, divest itself of jurisdiction, and evade the duty of hearing and determining it. The prayer of the petition should be granted, and it is so ordered.

MCKEE, J., and SHARPSTEIN, J., concurred.

[No. 9447. Department One.—July 27, 1886.]

THE PEOPLE EX REL. JOHN P. DUNN, STATE CONTROLLER, RESPONDENT, *v.* CHARLES D. BUNKER, APPELLANT.

IMMIGRATION COMMISSIONER — FEES FOR INSPECTION OF PASSENGERS — STATE MAY RECOVER FROM COMMISSIONER. — The commissioner of immigration of the port of San Francisco cannot justify his refusal to pay into the state treasury the fees collected by him under section 2955 of the Political Code, for the inspection of passengers on vessels arriving in that port from foreign ports, on the ground that the section is unconstitutional and the collections illegal, or because the board of supervisors of the city and county of San Francisco had failed to establish a lazaretto or lepers' quarters as required by the section.

ID. — ACTION TO COLLECT FEES — UNPAID DEPUTIES' SALARIES — ATTORNEY'S FEE. — In an action by the controller against the commissioner to recover the fees so collected, the defendant is not entitled to credit for items alleged by him to be due for unpaid deputies' salaries and attorney's fees in an action against him as commissioner.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The defendant was the commissioner of immigration for the port of San Francisco from January 19, 1880, to March 15, 1883. Between those dates, as such officer, he

collected \$40,871.60 from the masters, owners, and consignees of vessels arriving at the port of San Francisco from foreign ports and places, on account of passengers inspected by him on board of the vessels, according to the provisions of section 2955 of the Political Code. On the 1st of February, 1883, the controller demanded of the defendant that he account to him for all moneys so collected, and that he pay into the state treasury the surplus, after deducting his salary and the expenses of his office. This the defendant refused to do; whereupon the controller, proceeding under section 437 of the Political Code, stated an account with the defendant, and after another demand, instituted this action against him. On the trial, there was a written admission filed and put in evidence, which disposed of all questions of account between the defendant and the state, except as to certain credits claimed by him to be due for unpaid deputies' salaries and for the fees of his attorney in an action against him as commissioner to recover the amount of fees paid him under protest. The court disallowed these items, and rendered judgment against the defendant for the amount of the fees collected by him, less his salary and his office expenses actually paid. At the time the demands were made on the defendant for an accounting, no lazaretto or lepers' quarters had been established by the board of supervisors of the city and county of San Francisco, as required by section 2955 of the Political Code. The further facts are stated in the opinion.

W. W. Morrow, and H. G. Platt, for Appellant.

The law under which the money was collected was unconstitutional, as being an interference with the power of Congress to regulate commerce, and was not valid as a police regulation. Consequently the money did not belong to the state, and the defendant was not obliged to pay it into the treasury. (*Passenger Cases*, 7 How. 283; *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Lung*

v. Freeman, 92 U. S. 275.) If the money did belong to the state, the contingency on which it is made payable has not happened, as no lazaretto or lepers' quarters had been established by the board of supervisors. (Pol. Code, secs. 2952, 2955.)

Attorney-General Marshall, and Langhorne & Miller, for Respondent.

The defendant is not entitled to credit for alleged deputies' salaries and attorney's fees which he has not paid. (*Ramsey v. Gardner*, 11 Johns. 439; *Giddings v. Searle*, 103 Mass. 311; *Wynkoop v. Seal*, 64 Pa. St. 361; *McCroskey v. Mabey*, 45 Ga. 327; *Tracy v. Swartwout*, 10 Pet. 81; *Elliott v. Swartwout*, 10 Pet. 137; *Erskine v. Hohnbach*, 14 Wall. 613; *Moore v. Alleghany*, 18 Pa. St. 55.) A state officer cannot refuse to account and pay over to the state funds collected by him for public uses, for the reason that the law under which he made the collections was illegal or unconstitutional. (*Placer County v. Astin*, 8 Cal. 303; *McKee v. Monterey*, 51 Cal. 275; *Commonwealth v. Philadelphia*, 27 Pa. St. 492; *People v. Solomon*, 54 Ill. 461; *Waters v. State*, 1 Gill, 302; *O'Neal v. School Commissioners*, 27 Md. 344; *Moore v. Alleghany*, 18 Pa. St. 55; *Sessums v. Botts*, 34 Tex. 335; *Williams v. Holden*, 4 Wend. 223; *Smyth v. Titcomb*, 31 Me. 272; *State v. Cunningham*, 8 Blackf. 339; *People v. Brown*, 55 N. Y. 180; *Shoemaker v. Grant*, 36 Ind. 175; Cooley on Taxation, 497.)

MYRICK, J.—Action to recover from the defendant moneys received by him, as commissioner of immigration, under section 2955 of the Political Code. The court below allowed the defendant for his salary and office expenses actually paid, and rendered judgment against him for the surplus, with damages and interest as specified in section 437 of the Political Code.

1. The defendant, having assumed to act under a

statute of this state, and having collected moneys according to the letter of that statute, cannot be heard to say that the statute was in conflict with the constitution of the United States, that he was unauthorized to collect them, and that he was not bound to pay them over to the proper officer. Neither was he authorized to retain the moneys collected in excess of his salary and office expenses if the proper authorities failed to provide a suitable lazaretto or lepers' quarter. In collecting the money, he assumed to act as a state officer, and as between him and the state, he is bound by that assumption. (*Placer County v. Astin*, 8 Cal. 308; *McKee v. Monterey County*, 51 Cal. 275.) So one who holds himself out as a public officer, or acts as an officer *de facto*, is estopped to deny that he is an officer *de jure*, even on a criminal prosecution for malfeasance in office. (*State v. Stone*, 40 Iowa, 547; *Randall v. Dusenbury*, 63 N. Y. 645.)

2. The court did not err in refusing to allow, as items of office expenses, sums not paid to deputies. It is true, section 2969 was added to the Political Code, as a new section, after defendant received the moneys, but under that section there is full provision for compensation to the deputies if they are or shall be entitled thereto.

3. Under the statute, the defendant cannot retain the money because a person of whom money was collected has instituted an action against him to recover it. Having collected it, he should have let it take the regular course, viz., payment to the state treasury.

Judgment and order affirmed.

Ross, J., and McKinstry, J., concurred.

[No. 9062. Department One.—July 27, 1886.]

ALEXANDRIA KEDROLIVANSKY, RESPONDENT, *v.*
GUSTAVE NIEBAUM, APPELLANT.

SLANDER — WORDS IMPUTING WANT OF CHASTITY. — The action was brought to recover damages for an alleged slander. The complaint averred that the defendant said of and concerning the plaintiff, that "she was a bad woman, and that you had better have nothing to do with her case, as it is a very bad one; that she had not lived with her husband for two years previous to his death, and that she was the cause of her husband's death; that she had driven him to drinking, and that her husband fell while drunk, and was killed." It was further alleged that the words signified, and were understood by the hearer to mean, that the plaintiff had deserted her husband, and had, prior to his death, led an unchaste life, and had become *enciente* while living apart from him, and that such bad conduct on her part drove him to drinking, and caused his death. *Held*, that the complaint stated a cause of action.

ID. — MEANING OF AMBIGUOUS WORDS — QUESTION FOR JURY. — In such a case, the words used being ambiguous, their meaning is for the jury to determine.

APPEAL from an order of the Superior Court of the city and county of San Francisco granting a new trial.

The facts are stated in the opinion.

McAllister & Bergin, for Appellant.

Henry E. Highton, for Respondent.

BELCHER, C. C. — This is an appeal by the defendant from an order granting the plaintiff a new trial.

The action is for slander, alleged to have been spoken of and concerning the plaintiff by the defendant in the presence and hearing of a Mrs. Goodall.

The complaint alleges that the plaintiff is the widow of Paul Kedrolivansky, who died at San Francisco on the 19th of June, 1878, a subject of the Russian government, and the mother of six children, the youngest born to her on the 18th of September, 1878, and that she is in good standing and reputation, and is entitled, under the laws of Russia, to a pension of \$112.50 per month

for fifteen years; that being poor and destitute, with six children on her hands to support and educate, she applied to the Ladies' Protection and Relief Society of San Francisco for assistance, and thereupon Mrs. Goodall was authorized to visit the family of plaintiff, which she did on the 15th of November, 1879; that Mrs. Goodall, while visiting the family of plaintiff, saw there some of the children, and particularly the youngest, and immediately thereafter, in consequence of information received from plaintiff, went to the office of defendant "to ascertain, if possible, why the pension of plaintiff was not paid according to custom and the laws of the government of Russia"; and that the defendant then and there, in the presence and hearing of Mrs. Goodall, spoke and published of and concerning the plaintiff as follows:—

"That said plaintiff was a bad woman, and that you had better have nothing to do with her case, as it is a very bad one; that she (said plaintiff) had not lived with her husband for two years previous to his death, and that she (said plaintiff meaning) was the cause of her husband's death; that she had driven him (her said deceased husband) to drinking, and that her husband fell while drunk, and was killed."

It is then alleged that these words signified, and were understood by Mrs. Goodall to mean, that the plaintiff had deserted her husband, and had, prior to his death, led a dissolute and unchaste life, and had become *enciente* while living apart and separate from her husband, and that such bad conduct on the part of plaintiff drove her husband to drinking, and caused his death.

The defendant answered, denying, among other things, that he spoke of and concerning the plaintiff as charged in the complaint, or that he spoke any words which were slanderous or untrue.

The case was tried before a jury, and a verdict returned in favor of the defendant, on which judgment was entered. The plaintiff moved for a new trial, and her motion was

granted, upon the ground that certain testimony had been improperly admitted before the jury.

It is now claimed for the appellant—and this is the only point made—that the court erred in granting the motion for new trial, because the complaint stated no cause of action.

Under our statute, words which impute to a woman a want of chastity are slanderous and actionable *per se*. (Civ. Code, sec. 46.)

The words complained of here are alleged to have signified and been understood to mean that the plaintiff was an unchaste woman. Did they admit of the meaning imputed to them?

That they were understood by Mrs. Goodall to have the meaning charged is clear from her testimony. She said: "Well, he said she had driven him to drink, and I supposed she was an immoral woman, and had been untrue to her husband, or this little nursing child would not have been around. That is the inference that I drew; that is what had driven him to drink."

The words are somewhat ambiguous, but charges of unchaste conduct are seldom made in plain and direct words. They are usually made by indirection or insinuation, and however made are slanderous when they convey to the minds of the hearers the meaning that the woman was unchaste.

When the words used are ambiguous, it is for the jury to determine what is their meaning. The rule is thus stated by Townshend in his work on Slander and Libel, sec. 140: "Where the language is ambiguous, in that case the manner in which it was or might be understood by those to whom it was published is material, and will control in determining the meaning; but where the language is unambiguous, it is to be construed in its ordinary sense, and without reference to how those to whom it was published understood it, or what was intended by the publisher."

In *Kennedy v. Gifford*, 19 Wend. 300, it is said it is the sense in which the hearers understood the words on which the jury are to pronounce. And in *Dorland v. Patterson*, 23 Wend. 422, it is said the speaker "is accountable for the import of the words as they will naturally be understood by the hearer."

In *Riddell v. Thayer*, 127 Mass. 487, it was held that in an action for slander, if the slanderous words charged are that the plaintiff, a married woman, is a "bad woman," a "bitch," and a "whore," it is for the jury to determine the sense in which the word "bad" is used, and an instruction that for the purpose the jury may take into account the accompanying words and surrounding facts is not open to exception.

In *Vanderlip v. Roe*, 23 Pa. St. 84, the words spoken of the plaintiff were, "She is a bad character, a loose character." After verdict for the plaintiff, there was a motion in arrest of judgment, upon the ground that the words were not actionable. The Supreme Court said: "It is said that these words do not expressly charge fornication, and here lurks the whole error of the court below. This is in fact a return to the old doctrine of *mitior sensus*. They do charge it expressly, or not at all, unless we falsify their meaning by treating them too kindly. Such words are always understood as an assault upon the bright central virtue of a woman's character, and it is almost always made in a covert way,—such is the *norma loquendi*. There is some natural and instinctive decency still left even in the most degraded characters, that prevents them from speaking of this offense in the most direct terms. . . . The meaning of such expressions may be properly averred in the innuendo, and the jury must decide whether the averment is true." Judgment was then ordered to be entered upon the verdict.

In our opinion the complaint stated a cause of action, and the order appealed from should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the order is affirmed.

[No. 11518. Department One.—July 27, 1886.]

JOHN D. PALMER, APPELLANT, *v.* ARVILLE A. WHITE, RESPONDENT.

BUILDING CONTRACT — FAILURE TO RECORD — LIABILITY OF OWNER.
— Under section 1183 of the Code of Civil Procedure as amended in 1885, a contractor for the erection of a building cannot maintain an action against the owner to recover damages for not being allowed to complete the building, if the contract was not filed for record as required by that section.

APPEAL from a judgment of the Superior Court of San Diego County.

The action was brought by a contractor for the erection of a building against the owner to recover damages for not being allowed to complete the building. The contract was made on the 6th of November, 1885. The court sustained a demurrer to the complaint. The plaintiff declining to amend, judgment was rendered in favor of the defendant. The further facts are stated in the opinion of the court.

Works & Titus, for Appellant.

M. A. Luce, for Respondent.

MYRICK, J.—Plaintiff and defendant entered into a contract in writing for the construction by plaintiff for defendant of a building. It is not averred in the complaint in this action that the contract was filed for record as required by section 1183 of the Code of Civil Procedure as amended in 1885. This action is not brought to enforce a lien under chapter 2, title 4, of the Code of Civil Procedure, but is brought to recover damages for the non-

performance of the contract on the part of the defendant. A general demurrer to the complaint was sustained, and judgment went for defendant. We gather from the briefs of counsel that the order sustaining the demurrer was based on the clause in section 1183, *supra*, which declares that a contract of the character referred to is wholly void, and no recovery can be had thereon by either party thereto, unless it be filed for record.

Notwithstanding the declaration of section 1183, above noted, that the contract in certain events is wholly void, and no recovery can be had thereon by either party thereto, it is provided in the same section that other persons than the contractor furnishing materials and performing labor may have a lien therefor, and it is also provided in section 1197 that notwithstanding the other provisions of the chapter, any person to whom any debt may be due for work or materials may have a personal action to recover the debt.

The action is not to recover for work or materials, but is to recover damages for prevention of performance of the contract. As by section 1183 the contract as between the owner and contractor was void, not being recorded, no recovery can be had for damages for prevention of performance.

Judgment affirmed.

McKINSTRY, J., and Ross, J., concurred.

[No. 9367. Department One.—July 27, 1886.]

HENRY D. BACON ET AL., APPELLANTS, *v.* WILLIAM IRVINE ET AL., RESPONDENTS.

CORPORATION — ACTION BY STOCKHOLDERS — REQUEST ON DIRECTORS TO BRING — MUST BE MADE IN GOOD FAITH. — The action was brought by certain stockholders of a corporation against the company, its president, directors, and other officers, for the purpose of procuring the appointment of a receiver of the corporate

property; to compel each and all of the defendants to account to the company; that an assessment levied upon its capital stock be rescinded; and that the sale of the stock in payment of the assessment be enjoined. The complaint alleged that all of the individual defendants had conspired together and embezzled a large amount of the corporate funds. It further alleged that the plaintiffs had requested the directors of the corporation to bring the action in the name of the company, but that they had refused. On the trial, no evidence connecting the directors with any fraudulent act or embezzlement of the corporate property was introduced, and it appeared that the sole object of the action was to compel the defendants, other than the directors, to account to the company for certain corporate property alleged to have been fraudulently appropriated by them. *Held*, that the action could not be maintained by the stockholders, for the reason that the request made by them on the directors to bring the action was simulated, and did not express the real nature of the action that they desired to have brought.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion.

McAllister & Bergin, for Appellants.

The court erred in granting a nonsuit as against any of the directors, on the ground that no proper demand had been made on them to institute the action in the name of the company. Such a demand would have been unavailing, as the directors were the very parties charged with the wrong. Under these circumstances, the rule of equity is, that no demand is necessary by the stockholders before they commence their action. (Morawetz on Corporations, sec. 386; *Hazard v. Durant*, 11 R. I. 202; *Dike v. Green*, 4 R. I. 285; *Heath v. E. R'y Co.*, 8 Blatchf. 347; *Rogers v. Lafayette Ag. Works*, 52 Ind. 306; *March v. Eastern R. R. Co.*, 40 N. H. 548; *Robinson v. Smith*, 3 Paige, 222; *Dodge v. Woolsey*, 18 How. 331; *Brewer v. Boston Theatre*, 104 Mass. 378; *Hodges v. New England Screw Co.*, 1 R. I. 312; *Goodin v. Cincinnati etc. Co.*, 18 Ohio St. 169; *Peabody v. Flint*, 6 Allen, 52; *Sears v. Hotchkiss*, 25 Conn. 171; *Wright v. Oroville etc. Co.*, 40 Cal. 20; *Allen v. Curtis*, 26 Conn. 456.)

George W. Towle, Jr., for Respondent William Irvine.

This being a stockholders' suit, it is necessary to show a request made to the directors to bring the action in the name of the corporation, and a refusal so to do, before the stockholders can maintain the action. The request must be made in good faith, and if it appears not to have been so made, but to have been made in such wise as to designedly prevent the corporation from granting it, with a view of keeping the conduct of the action in the hands of the stockholders, then the request and refusal will confer no right upon the stockholders to maintain the action. (*Hawes v. Oakland*, 104 U. S. 450.)

FOOTE, C.—This is an appeal from a judgment of nonsuit and an order denying a new trial.

The plaintiffs, Henry D. Bacon and others, stockholders of the Morgan Mining Company, instituted an action in equity against that company, its president, Charles T. Botts, its treasurer, William Irvine, its superintendent, Robert Irvine, John Douglass, an employee, and James H. Wallace, Joseph M. Maguire, Robert Dixon, and T. K. Wilson, directors of said corporation. The purpose had in view by the plaintiffs in bringing their suit appears from the complaint to have been to procure the appointment of a receiver to take charge of the mine, and all the property thereto appertaining, and its products, and that each and all the defendants be compelled to account to the company; that an assessment before that time levied upon its capital stock be rescinded, and that an injunction be issued restraining the sale of any of said stock for the non-payment of said assessment, and for general relief.

It was charged against each and all of the board of directors, including its president, C. T. Botts, the treasurer, William Irvine, the superintendent, Robert Irvine, and John Douglass, who was the foreman of the mine, that they had embezzled gold produced from the mine to the extent of more than one hundred thousand dollars.

The material allegations, charging conspiracy, fraud or embezzlement, were denied by the answers of the several defendants.

So far as the proofs introduced by the plaintiffs on the trial of the cause (which was had before the court without a jury) threw any light upon the matter, it did not in the remotest degree connect Charles T. Botts, T. K. Wilson, James H. Wallace, Joseph M. Maguire, or Robert Dixon with any transaction whatever which showed them to have been guilty of the smallest degree of turpitude, or that they even had the least opportunity, in any connection whatsoever, to have been guilty of the charges made against them.

The evident effort, as disclosed by the proof adduced, was to show that William Irvine, Robert Irvine, and John Douglass had fraudulently appropriated a great amount of gold that had been obtained from the mine, so that they only of the defendants should be compelled to account for and pay over such products.

There appeared to be an end to the project of forcing the directors to any accounting, or to restrain the collection of the assessment on the capital stock.

To us it appears that the plaintiffs, at the time they, in writing, requested the president and directors of the mining company to institute an action "against said William Irvine and the aforesaid present directors of said company," were aware that they had no cause of action against said directors at least.

It does not follow, even although in their answers they have sustained William Irvine in his acts, that if a full and fair presentment of real, tangible, and clear facts going to show any bad faith in the management of the mine on his part, and that of his brother and John Douglass, had been made to them, that said directors would have declined to institute a suit against the three persons above named; for it is not fair to presume that men as untainted with fraud as those directors are shown to be

would have refused in a proper case to bring such an action.

The real object had in view, as the evidence discloses, was not stated to the directors, and that was not fair-dealing toward them.

From all of which conduct in the premises on the part of the plaintiffs, it is clear that their request was not an earnest but a simulated one. In such a case, a court of equity will not entertain such an action by stockholders as this. (*Hawes v. Oakland*, 104 U. S. 450, 460, 461.)

We have examined all the evidence in the transcript with care, but have failed to find any *facts* proved which show William Irvine, his brother Robert, or John Douglass to have, either singly or together, appropriated to their own use any of the products of the mine.

The only things which have been made clear and certain are, that all their acts were open and above-board.

That the sum of \$9,305.62 was accounted for to the company as that which had come through the hands of the two Irvines and Douglass as part of the output of the mine.

That some of the ores taken out therefrom had been stolen by an employee, the amount of which could not be ascertained.

That samples of ore had been sent to the office of the corporation, the exact value of which was unknown.

Beyond this, nothing is disclosed in the voluminous testimony of many witnesses, rising to the dignity of even probability, which touches the integrity of those complained of.

The witnesses differ materially as to how much the mine produced, and as to what went with the ores taken out.

It does not appear to us possible that the learned judge below could have formed even an approximate opinion as to what the real value of such ores was, or as to what disposition was made of them.

To have rendered a judgment against any of the defendants, as prayed for, would have been to have substituted conjecture for necessary proof.

We are therefore of opinion that the judgment and order should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 11319. Department One.—July 27, 1886.]

ROBERT ANDERSON ET AL., RESPONDENTS, *v.* S. N. BLACK ET AL., APPELLANTS.

FINDINGS — EQUITABLE AVERMENTS IN COMPLAINT — ADMISSIONS IN ANSWER — VERDICT — JUDGMENT. — In an action to recover the possession of real property, and for an injunction, where a verdict is rendered in favor of the plaintiffs, upon which judgment is entered, no findings are necessary upon the equitable averments of the complaint, if they are not denied by the answer.

MINING CLAIM — ACTION FOR POSSESSION — MONUMENTS — NOTICE — EVIDENCE — CROSS-EXAMINATION. — The action was brought to recover the possession of a certain mining claim. On the trial, a witness for the plaintiffs was asked on cross-examination as to the location of a side-line monument and notice. On his examination in chief, he had not testified as to such matters. *Held*, that the question was not responsive to the examination in chief, and was properly disallowed.

ID. — SUFFICIENCY OF LOCATION — MARKING BOUNDARIES — INSTRUCTION. — In such an action, the question whether the location of the plaintiffs was so distinctly marked on the ground that its boundaries could be readily traced is for the jury; and where there is evidence to that effect, the court should not instruct the jury that the omission to erect a monument at a certain corner of the claim would be fatal to the plaintiffs' location.

ID. — EXCESSIVE LOCATION — VALIDITY OF CANNOT BE FIRST QUESTIONED ON APPEAL. — An objection to the validity of the location on the ground of the extent of the claim refused consideration because not taken at the trial.

EVIDENCE — CONFLICT OF — VERDICT. — Where the evidence is conflicting, a verdict will not be disturbed on the ground that it is not justified thereby.

ID. — EVIDENCE TENDING TO SHOW ILL WILL OF WITNESS — REJECTION OF WHEN NOT ERROR. — On the trial, one of the plaintiffs, when testifying as a witness in his own behalf, was asked on cross-examination if he had not on a certain night gone with shot-

guns upon the premises in controversy, while the defendants were in the peaceable possession thereof, and forcibly dispossessed them. The court disallowed the question. *Held*, that the question was proper as tending to show that the witness was biased or entertained ill will against the defendants, but that its rejection was without prejudice, as the witness had previously admitted entertaining ill will towards one of the defendants.

APPEAL from a judgment of the Superior Court of San Bernardino County, and from an order refusing a new trial.

The plaintiffs claimed title to the mining ground in controversy under a location made on the 5th of April, 1881. The defendants claimed under a subsequent over-lapping location. The further facts are stated in the opinion.

Bryon Waters, and W. A. Harris, for Appellants.

H. C. Rolfe, for Respondents.

Foote, C.—This action was instituted for the purpose of recovering the possession of specific real property, a mining claim, with damages for the withholding thereof, and for a temporary injunction pending the action.

The verdict of the jury was in favor of the plaintiffs for the recovery of the possession of the property sued for, without damages. It does not appear from the record whether or not any injunction had been granted.

From the judgment rendered in the cause and an order refusing a new trial the defendants appeal.

The first point made by them is, that the cause was one which involved equitable matters, as well as those of law, and that the court entered its judgment upon the general verdict of the jury, without any findings.

The only matters of fact which were set up in the complaint as equitable in their nature, and entitling the plaintiffs to a temporary restraining order pending the action, were set up in the fifth paragraph of the complaint.

Those allegations were the only basis upon which a temporary injunction was claimed against the defendants, and were to the effect that the latter were continuing, and threatening to continue, to mine and extract ores and valuable metals from the plaintiffs' alleged premises, yet they were not denied in the answer. The only effort made in that direction was a denial that the defendants had extracted ores or valuable metals from the premises sued for, to the plaintiffs' damage. Thus no equitable issue was raised by the pleadings upon which it became the duty of the court to make a finding.

But that tribunal, it is urged, erred in sustaining the plaintiffs' objection to a question, upon cross-examination, put to the witness Silver by the defendants' attorney.

The question was this: —

"Please point out with reference to that excavation (on plaintiffs' map) where that side-line monument is."

The objection was that it was not responsive to the examination in chief.

It appears that the witness had testified in chief to nothing indicating the existence of any side-line monument; the action of the court in the premises, therefore, was proper.

The defendants afterward called this witness as their own, and proved the location of side-line monuments, so that they suffered no detriment.

Nor in his examination in chief had this witness said anything about monument No. 1, and the objection made to the cross-question put to him, "Was there a notice in No. 1?" was properly sustained.

Another question which it is claimed should have been allowed to be answered by the witness Anderson was: "I would like to know if you did not in the month of December last go upon this ground, where they were in possession, working peaceably, with shot-guns, in the night-time, and take forcible possession?"

The reason of its being regarded as a proper question by the defendants is, that the witness had been inquired of if he entertained any bias or ill will toward the defendants, and that he had replied, "No, sir, I do not, except one"; and that therefore, as tending to show the state of mind of the witness as biased against the defendants, it was proper to show an act of violence done toward them by the witness. Upon the other hand, the plaintiffs contend that to have allowed the question would have been to permit the credibility of the witness to be assailed by proof of a particular wrongful act on his part, and would have been in violation of section 2051 of the Code of Civil Procedure.

If it had clearly appeared that by putting that question an attempt was being made to attack the credibility of the witness by showing him to have committed such a wrongful act as is meant by the section of the Code of Civil Procedure, *supra*, the action of the court would have been correct; but it seems evident from the record that the cross-examination of which the question was a part was for the purpose, not of exhibiting the witness to the jury as one unworthy of belief because of the commission of a crime or unlawful act, but as one who, if he had taken part in a violent demonstration against the defendants of the kind designated in the language of the query put to him, might perhaps have been thought by the jury to be biased or to entertain ill will against the defendants. And in this point of view, it is not deemed by us to have been an improper question, "as it is perfectly well settled that on cross-examination a witness may be interrogated as to any circumstances which tend to impeach his credibility by showing that he is biased against the party conducting the cross-examination, or that he has an interest in the result adverse to such party." (*People v. Benson*, 52 Cal. 381.)

But as the witness had by his answer to a previous question already admitted bias or ill will to exist on his part

as to one of the defendants, and was confessedly a party to the suit whose interest was adverse to that of the defendant, we do not see how any injury resulted to them from the question not having been answered. If the witness had admitted the facts to exist as intimated by the question, he could not have appeared to the jury by such act to have been more unworthy of belief because of bias or ill will than he had already confessed himself to be, for he was just as likely to be influenced in giving his testimony in the cause from ill will toward one as all of the defendants, and his interest in the suit as against them all was an undisputed fact in evidence.

It is contended by the defendants also that the court erroneously refused to give an instruction asked by them, as follows:—

“If the jury find from the evidence that McBride and Silver, intending to locate the mining ground claimed by plaintiffs, erected monuments upon the southwest, northwest, and northeast corners thereof on the fifth day of April, 1881, but that they did not erect any monuments at that time to designate the southeast corner of the claim, and that prior to the erection of such monument marking the southeast corner of said claim Covington and Davis located the Nellie Gray claim, and erected monuments thereon whereby the boundaries thereof could be readily traced, then you will find for the defendants.”

This instruction, if given, would have informed the jury, as a matter of law, that the mere fact that the locators did not place a monument at a certain corner of the claim they intended to locate would be fatal to the plaintiffs' right to recover, even although it should appear from all the evidence in the cause that the location was so distinctly marked on the ground as that its boundaries could be readily traced. Therefore the instruction was properly refused, as being in contravention of the statute and invading the province of the jury by instructing them upon the

weight of evidence. (U. S. R. S., sec. 2324; *Taylor v. Middleton*, 67 Cal. 656.)

Another point made is, that the evidence was insufficient to justify the verdict. As the jury arrived at their conclusion in the case upon conflicting testimony, we do not think their verdict should be disturbed.

It is further insisted upon as a reason for the reversal of the judgment and order that the proof showed the claim to have exceeded fifteen hundred feet in length. This point was not raised on the trial, either in a motion for a nonsuit, upon instructions to the jury, or in any other way brought to the attention of the court or counsel. And it cannot be successfully urged for the first time here. (*McDonald v. Bear River and Auburn W. & M. Co.*, 13 Cal. 238; *King v. Meyer*, 35 Cal. 646; *Stoddard v. Treadwell*, 29 Cal. 281.)

For these reasons, we are of opinion that the judgment and order should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

[No. 11385. Department Two.—July 28, 1886.]

WILLIAM MACE, RESPONDENT, *v.* JAMES
O'REILLEY, APPELLANT.

PRACTICE — EXPIRATION OF TERM OF JUDGE — ENTRY OF JUDGMENT AFTER — FINDINGS — WAIVER OF. — Where the term of office of the judge who tried the case expires after an order for judgment has been entered, but before the findings have been filed, no valid judgment can be entered in the action without a new trial being had, unless agreed findings are filed or waived by both sides.

ID. — JUDGMENT ENTERED WITHOUT FINDINGS — MOTION TO VACATE — NOTICE — TIME FOR MAKING MOTION. — If no agreed findings

are filed or waived, a judgment entered in conformity with the order after the expiration of the term of office of the trial judge may be set aside for want of findings on the motion of the party in whose favor the judgment is entered, without notice to the opposite party, notwithstanding the latter offers to waive findings, or to have them made by the successor of the judge who tried the case, and tenders to the prevailing party the amount of the judgment. Such a motion may be made after the expiration of six months from the date of the order for judgment, and after the termination of the session of the court at which it was made.

ID. — MOTION MAY BE RENEWED AFTER DENIAL — JURISDICTION — DISCRETION. — In such a case, the court has jurisdiction, and it is within its discretion, to allow the motion to vacate the judgment to be renewed, although it had previously been denied.

APPEAL from an order of the Superior Court of Los Angeles County vacating a judgment.

The facts are stated in the opinion.

H. K. S. O'Melveny, and C. N. Wilson, for Appellant.

Graves & Chapman, for Respondent.

FOOTE, C. — Mace brought an action for malicious prosecution against O'Reilley, claiming five thousand dollars damages.

The cause was tried by the court without a jury, and an order for judgment for one hundred dollars entered in the minute-book of the trial court in favor of the plaintiff, but no finding were *filed* or *waived*, and no final judgment ever entered. The order for judgment was made on the 16th of September, 1884. On the 19th of January, 1885, plaintiff moved the court to set the cause for trial, assuming that such was the proper course to pursue. That motion was denied by the court, and afterward, on the thirtieth day of March, 1885, the plaintiff served a notice and affidavit for the hearing on the thirteenth day of April, 1885, of a renewal of that motion, which the court had granted him leave to make. The affidavit set out, among other things, that the cause had been tried originally by Judge Howard, whose term expired in January, 1885, and that no findings had ever been filed, or final judgment

entered, or any other proceeding had since the entry of the minute order of the judge of the 16th of September, 1884.

The defendant resisted this last motion, on the grounds that after the entry of the order of September 16, 1884, he had paid the amount of the judgment to the clerk of the court for the plaintiff, and had thereby waived all findings and entry of formal judgment in the action, because the court had no jurisdiction to grant the motion on the ground alleged, and that no notice was served within six months from the entry of the order for judgment; and further, because the defendant again waived all findings or judgment, and tendered and offered the money to the plaintiff, then on deposit with the clerk. On the 13th of April, 1885, the motion to place the cause on the trial calendar and vacate judgment was denied; the court basing its ruling upon the ground that the minute order of September 16, 1884, was not a nullity, and therefore that it could not wholly grant the motion, and that a final judgment must first be entered upon said order, and then plaintiff could attack that judgment thus made.

In pursuance of that suggestion, on the first day of June, 1885, the plaintiff moved the court to enter judgment in accordance with the order of Judge Howard.

On the 14th of September, 1885, the judgment on that order was made and entered by the clerk of the court.

The motion of the 1st of June, 1885, for entry of judgment, and the order of the 14th of September, 1885, in relation thereto, were without notice to the defendant.

On Monday, the 21st of September, 1885, the plaintiff made a motion (and filed an affidavit in support of it, setting out that no findings had been made or waived in the cause) that the judgment be vacated and the cause set for trial anew. Upon the argument of that motion, the defendant offered, by an entry on the minutes of the

court, to waive all findings or to agree to any findings necessary to support the judgment which the plaintiff might desire or the court make. The court, however, on the 24th of September, 1885, granted the motion of the plaintiff and made an order setting aside the judgment *for the want of findings*, as they had not been waived.

From that order the defendant appealed, and specified as errors of the court in granting it the following:—

The court had no jurisdiction to make the order of June 1, 1885, as the defendant had no notice of it.

Until the orders made by the court on the 21st of January and April 13, 1885, were vacated, the court had lost its jurisdiction. Because the session of the court had expired at which the judgment ordered in 1884 had been entered, and more than six months had intervened.

The order of June 1, 1885, was granted upon the express condition that plaintiff was thereby to be enabled to move for a new trial, and the court erred in granting a re-setting of the case for trial without such motion being made, and by indirection allowing plaintiff to evade that condition.

That the court ought to have filed the necessary findings, which the defendant stipulated might be done.

Because the order of the court in granting the motion of the 21st of September, 1885, was against law and against the express condition on which the judgment was ordered on the 1st of June, 1885. All the matters thus adverted to were included in a bill of exceptions.

It is very evident that no valid judgment was entered in this cause during the administration of Judge Howard, as an order for judgment is not a final judgment. (*Macnevin v. Macnevin*, 63 Cal. 186.)

When that judge went out of office the trial was incomplete, and no proper judgment could be entered.

It seems to us that a new trial was inevitable, unless agreed findings should be filed or waived by both sides to the controversy.

The motion to vacate the judgment as made was initiated within about seven days after its rendition.

The fact that plaintiff did not formally move for a new trial, but chose rather to move to set aside and vacate the judgment, is of no material consequence. A new trial was inevitable in either event, and no error was committed by the court in setting aside the judgment for the want of findings. (*Van Court v. Winterson*, 61 Cal. 615.)

We are aware of no statute which required the defendant to be notified of an application to the court to have a final judgment entered against the defendant upon an order therefor formerly entered.

In the case of *Savings and Loan Society v. Thorne*, 67 Cal. 53, this court declared that a motion made to vacate a judgment for the want of findings was not limited to six months from the time of the entry of the judgment, and that section 473 of the Code of Civil Procedure was not applicable to such a case.

There is no waiver of findings shown in this record, as required by the statute, unless it should be held that the waiver of the defendant of all findings should entitle him to have a judgment entered up against himself without the plaintiff ever having waived findings.

Such is the ruling which the defendant desires made, but we cannot concur with him, as according to our view a waiver of findings to be conclusive must be assented to by all the contending parties to an action.

The objection that the court lost jurisdiction to make the order appealed from because it had previously made orders denying motions to set aside the judgment, at a session of court which had expired, is without merit. "Our constitution and code have abolished terms of court, and the rules which formerly prevailed for the correction of errors and irregularities cannot, as to time, be literally applied." (*Wiggin v. Superior Court*, 68 Cal. 398.) And we see no reason why the court could not in its discretion

allow a motion to be renewed which it had formerly denied.

The fact that the defendant paid the one hundred dollars to the clerk for the plaintiff before any final judgment was entered, and the plaintiff did not take it, furnishes no reason why the court should not have made the order appealed from.

Nor do we perceive why the judge should have filed findings in a cause which he had not tried, and the evidence in which he had not heard, upon the offer made by the defendant to allow such a course to be taken without the concurrence of the plaintiff.

We perceive no prejudicial error in the record, and the order should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

THE COURT. — For the reasons given in the foregoing opinion, the order is affirmed.

[No. 9431. Department Two.—July 28, 1886.]

**CORNELIUS KING, APPELLANT, *v.* ANDREAS GOTZ
ET AL., RESPONDENTS.**

**HOMESTEAD — PROPERTY SUBJECT TO TRUST DEED — DECLARATION
MAY BE FILED ON.** — A person residing with his family on community property, which he had previously conveyed by a deed of trust to secure an indebtedness, has such an interest in the property, notwithstanding the trust deed, as entitles him to make a valid claim of homestead thereon.

ID. — PROPERTY NOT OCCUPIED BY CLAIMANT — CLAIM OF AS HOMESTEAD. — A declaration of homestead covering certain premises on which the claimant resided, and certain other premises which were not occupied by him, is valid so far as the land resided on is concerned.

ID. — DECLARATION — ESTIMATED VALUE OF PREMISES. — A declaration of homestead is not invalid, although the value of the premises claimed as a homestead is estimated at seven thousand dollars.

ID. — DEBTOR MAY DECLARE HOMESTEAD — FRAUD ON CREDITORS. — The head of a family having property subject to a homestead declaration, and who is indebted to third persons, may, notwithstanding his indebtedness, exercise his right of homestead; and the

fact of his having done so is not in itself sufficient evidence of fraud to invalidate the homestead claim at the instance of his creditors.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion.

C. V. Grey, for Appellant.

A. Campbell, Sen., and *Campbell & Sanderson*, for Respondents.

SEARLS, C.—This is an action of ejectment to recover a lot of land in the form of a parallelogram, twenty-five feet by sixty feet and ten inches, near Golden Gate Avenue and Laguna Street, San Francisco. The cause was tried by the court, and findings in writing filed, upon which judgment in favor of plaintiff was entered for a strip of land across the north end of and parcel of the lot sued for, eight feet four inches in width by twenty-five feet in length.

The appeal is by plaintiff from the judgment and from an order denying a new trial.

The demanded premises constitute the southerly or rear portion of a lot 25 by 137½ feet on the south side of Tyler Street, now known as Golden Gate Avenue, San Francisco.

Plaintiff's claim is based upon a sheriff's deed executed to him pursuant to a sale under execution on a judgment in his favor against the defendant Andreas Gotz.

Defendants Gotz and wife claim the premises as a homestead under the statute of California, and if at the date of the inception of the lien upon which the property was sold under execution the premises were not impressed with the homestead character, plaintiff is entitled to a reversal of the judgment; otherwise it should be affirmed.

The whole lot 25 feet by 137½ feet deep, southerly, was purchased by Gotz in 1873, and was community property.

Gotz, with his family, consisting of a wife and two children, went to reside upon the lot in 1873, and ever since have resided in a house upon the rear portion of said lot, the front line of the house being about one hundred feet southerly from the south line of Tyler Street, and extending across the width of the lot.

In 1876 Gotz built a two-story and basement house on the front portion of the lot, at an expense of upward of six thousand dollars; said house covers the whole width of the lot, leaving an entry on the westerly side under the main story for access to the rear of the lot. The house and fences connected with it inclosed the northerly 76½ feet of the lot, and has never been occupied by Gotz or his family, but down to the time of the sale thereof to plaintiff was rented to and occupied by tenants.

In December, 1879, Gotz executed, acknowledged, and delivered to James de Fremery and Alexander Campbell, Sen., a deed of trust, which was duly recorded December 24, 1879, and was executed to the grantees and trustees to secure the payment of two thousand five hundred dollars and interest, according to the tenor of a promissory note, for money borrowed from the San Francisco Savings Union, etc., and providing that upon payment, etc., the property should be reconveyed to Gotz, etc. This trust deed conveyed the whole lot.

On the 13th of September, 1880, Gotz made, acknowledged, and recorded in the proper office a declaration in the usual form, claiming the whole lot as a homestead, estimating the cash value at seven thousand dollars, adding subject, however, to a mortgage of two thousand five hundred dollars on said premises.

On the sixteenth day of February, 1881, Gotz and wife executed, acknowledged, and recorded an abandonment of

the homestead; and on the same day Gotz executed a second trust deed in like manner and form to the same trustees upon the same lot, to secure the payment of one thousand four hundred dollars to the same creditor; and thereafter and on the same day executed a second declaration of homestead upon the same lot of land as the first, "subject to the two trust deeds."

This homestead declaration was recorded after the second trust deed.

The money not having been paid when due, the north-easterly twenty-five by eighty-five feet of the lot was sold by the trustees under the two trust deeds, and purchased by plaintiff.

The trustees thereupon conveyed to Gotz the southerly 25 by 52½ feet of the lot, with the right of way thereto, which portion constitutes the demanded premises, found to be of the value of three thousand dollars, and no more.

The position taken by appellant is, that a homestead can only be selected from community property or the separate property of the husband, or with the consent of the wife from her separate property. (Civ. Code, sec. 1238.)

That community property is property *owned* which has been acquired after marriage, and that the property described in the complaint was not at the date of filing the declaration of homestead *owned* by the defendants, or either of them, for the reason that it had been conveyed to De Fremery and Campbell under the trust deeds, and therefore that no homestead right could attach thereto.

"The homestead consists of the dwelling-house in which the claimant resides and the land on which the same is situated, selected as in this title provided." (Civ. Code, sec. 1237.)

Defendant Andreas was residing with his family in the dwelling-house upon the land described in his declaration at the date of making and filing such declaration, and to that extent his homestead is valid. (*Dorn v. Howe*, 52 Cal. 630.)

"If the claimant be married, the homestead may be selected from the community property," etc. (Civ. Code, sec. 1238.)

Defendant Andreas Gotz, who made the declaration, was married, and if he had any property in the premises, it had been purchased subsequent to marriage, and was *community property*.

The term "property" in its broad sense signifies that to which one has an unrestricted and exclusive right, including all that is one's own, whether corporeal or incorporeal. (Bouvier's Law Dict., tit. Property.)

"The term 'property,' as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory as well as those which are executed." (Chief Justice Marshall in the two cases of *Soulard* and *Smith v. United States*, 4 Pet. 511.)

We see no reason for doubting the interpretation placed by Chief Justice Marshall upon the word "property," when applied to real estate. In this state, as elsewhere, the mere possession of real estate is constantly treated as property, which may be purchased and sold, and for the recovery of which an action may be maintained against one having no better title.

"Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession." (Civ. Code, sec. 1006.)

The defendant Gotz, notwithstanding the execution of the trust deed, had an interest in the property which he could transfer or devise, subject only to the trust. (Civ. Code, sec. 864.)

And the grantee under him would acquire a legal estate in the property, except as against the trustees and those lawfully claiming under them. (Civ. Code, sec. 865.)

It follows from these provisions (which modify section

863 of the same code) that the trustor of an express trust, except as to his trustee and those holding under him, is treated as the holder of the legal title.

The deeds of trust left an interest in Gotz which could have been sold under execution. (*Kennedy v. Nunan*, 52 Cal. 326.)

It is the property of the judgment debtor in real estate which may be sold under execution, and we fail to see how the defendant Gotz had such a property in the demanded premises as gave to the purchaser under execution a *title*, and yet at the same time was not sufficient to support a claim of homestead.

Under these circumstances, we are of opinion that Gotz, who was residing with his family in the dwelling-house upon the premises, had, notwithstanding the trust deeds, such an interest in the property as entitled him to make a valid claim of homestead. He was in possession of and residing upon the land, and whatever title he had, whether legal or equitable, was subject to and sufficient to support a homestead; and when the trustees of the Savings Union afterwards, upon the execution of the trust, reconveyed to him the demanded premises, he became the holder of the entire title, legal and equitable. (*Spencer v. Geissman*, 37 Cal. 96; *Brooks v. Hyde*, 37 Cal. 366.)

2. The description of the premises in the declaration of homestead included the whole lot of 25 by 137½ feet, upon the portion of which now in dispute Gotz had his dwelling and resided. The front of the lot was covered by a building not occupied by him, but was rented and occupied by tenants.

The claim of premises not the subject of a homestead did not invalidate his claim as to that clearly subject to such exemption. (*Gregg v. Bostwick*, 33 Cal. 220; *Mann v. Rogers*, 35 Cal. 319; *Tiernan v. His Creditors*, 62 Cal. 286.)

3. As to the value: the declaration estimates the value

at seven thousand dollars. The actual value of the demanded premises is admitted to be three thousand dollars. *Ham v. Santa Rosa Bank*, 62 Cal. 125, and *Tiernan v. His Creditors, supra*, are conclusive of this question.

4. The facts as set out in the record do not make out a case of fraud against the defendant.

The head of a family having property subject to a homestead declaration, and who is indebted to third persons, may, notwithstanding such indebtedness, exercise his right of homestead, and the fact of his having done so is not in itself such evidence of fraud as will invalidate his homestead claim at the instance of his creditors.

The law, for wise and beneficent purposes, secures to the family a right to have a homestead selected in the manner indicated by the statute, and this right may be exercised as well against existing as against future creditors, without the imputation of fraud for so doing.

We are of opinion the judgment and order appealed from should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 11507. Department Two.—July 28, 1886.]

HELEN Z. TIBBETTS, APPELLANT, *v.* C. W. FORE
ET AL., RESPONDENTS.

INJUNCTION — LAND PURCHASED BY MARRIED WOMAN — SEPARATE PROPERTY — SALE OF UNDER EXECUTION AGAINST HUSBAND. — A married woman is entitled to an injunction to restrain a threatened sale, under an execution against her husband, of real property purchased by her during coverture in her own name and with her separate property.

ID. — CLOUD ON TITLE — PRESUMPTION AS TO COMMUNITY PROPERTY — EVIDENCE TO OVERCOME. — In such a case, the execution sale

would cast a cloud upon her title, because, in an action of ejectment brought by the execution purchaser founded upon the sheriff's deed, she would be compelled, in order to overcome the presumption that the land was community property, to introduce evidence *dehors* the record, showing that the purchase was made with her separate estate.

APPEAL from a judgment of the Superior Court of San Bernardino County.

The facts are stated in the opinion.

William A. Harris, for Appellant.

Paris & Goodcell, for Respondents.

FOOTE, C.—The wife of one Tibbetts brought an action against Gill as sheriff of San Bernardino County, California, and others, which had for its object to enjoin a sale under execution (issuing by virtue of a judgment against her husband) of a certain house and lot in the town of Calico, claimed by her as her separate property.

The cause was tried by the court, and judgment rendered in favor of the defendants; from that, and an order denying her a new trial, the plaintiff appealed.

The record contains only the judgment roll. From the findings, it is disclosed that the plaintiff purchased the land threatened to be sold for one hundred dollars, which was her own money and separate property; that she thereupon immediately entered into possession of it, and with other money, also her separate property, erected a building thereon; that at the time of the purchase of the lot she was, and has ever since been, the wife of R. G. Tibbetts, the defendant in the execution, and that he never had any interest in the land or building thereon; that before the bringing of the present action, the assignee of the plaintiff in the execution, which was issued upon a judgment rendered against the said R. G. Tibbetts, caused that execution to be levied by Gill, as sheriff, upon the plaintiff's said property as that

of R. G. Tibbetts, her husband, and said sheriff was at the time of the institution of this action threatening and about to sell at as belonging to said R. G. Tibbetts; that the plaintiff's title and that of her grantors and predecessors was a possessory claim only to the land, the legal title of which was still in the United States of America; that the plaintiff had never resided upon the premises, and that at the time of the levy of the execution she had leased the house and lot to a person who occupied them as her tenant, and that her husband did not have possession thereof.

And as a conclusion of law therefrom, it is held by the trial court that the threatened sale of the premises by the sheriff will not cast a cloud on the plaintiff's title.

The statutes with reference to community property "proceed upon the theory that the marriage, in respect to property acquired during its existence, is a community, of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other. To the community all acquisitions by either, whether made jointly or separately, belong. No form of transfer or mere intent of parties can overcome this positive rule of law. All property is common property, except that owned previous to marriage or subsequently acquired" by gift, devise, bequest, or descent, with the rents, issues, and profits thereof.

The presumption, therefore, attending the possession of property by either is that it belongs to the community. Exceptions to the rule must be proved. And if it is sought to be shown that a purchase of property has been made with the separate funds of either husband or wife, it should be "affirmatively established by clear and decisive proof." For in the absence of such proof, the presumption would be absolute and conclusive in favor of the community, and

it would make no difference whether a conveyance of such property was taken in the name of the wife or the husband, or both. (*Meyer v. Kinzer*, 12 Cal. 252, 253; S. C., 73 Am. Dec. 538.)

The husband has the entire control during his life of the community property. (Civ. Code, sec. 172; *Greiner v. Greiner*, 58 Cal. 115.) Such property is liable to his debts. (*Adams v. Knowlton*, 22 Cal. 283-288.) And the burden of proof is on the wife to show that property which *prima facie* belongs to the community is her separate property. (*Adams v. Knowlton, supra.*)

Possession of the wife is the possession of the husband. (*Schuler v. Savings and Loan Society*, 64 Cal. 397.) According to the findings, Mrs. Tibbetts was in possession of the property by her tenant; it had been acquired during the existence of the marriage between herself and her husband, the defendant in the execution; the execution creditor and the sheriff were seeking to sell it to satisfy the judgment; and that property was *prima facie* community property.

To defeat an action of ejectment for the premises in controversy which might be brought by one having purchased under such a sale, it would have been necessary for Mrs. Tibbets "affirmatively to establish by clear and decisive proof" that the property was bought with her own money, as separate property.

Whenever one applying for an injunction can show, as she has done, such a state of facts to exist, then the right to have it granted, as a preventive against a cloud upon title, undoubtedly exists. For in an action of ejectment, the burden of proof would rest upon her to show the premises in question to have been purchased with her separate property or money, as the record of her title to the property bought in her name would not be conclusive that such was her separate property. (*Moore v. Jones*, 63 Cal. 12.)

When a necessity exists, as she is shown by this record

to be under, to make proof of her separate property *dehors* a deed of conveyance, an injunction to prevent a sale under execution of the kind here attempted will be appropriate, and should be granted.

For the true test by which to determine the question whether a sheriff's deed under an execution sale would cast a cloud upon the plaintiff's title is this: "Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery?" (*Pixley v. Huggins*, 15 Cal. 129-134.)

And to obtain the injunction she sought, in order to prevent such a sale as was threatened, it was only necessary for the plaintiff to show, as she has, that a conveyance under the execution sale would have compelled her (in a suit of ejectment brought against her by one who might have become a purchaser at that sale, and holding the sheriff's deed) to have shown *dehors* her muniments of title, that she had purchased the lot, and built the house upon it, with her separate money or property. *Pixley v. Huggins, supra; Hall v. Thiesen*, 61 Cal. 525, 526.)

If the sheriff had been permitted to make a sale of the house and lot under the writ he had levied upon them, and the purchaser holding his deed thereunder had brought suit in ejectment against Mrs. Tibbetts, she would have been compelled in defending that action to have shown by evidence *dehors* the deed from her grantor that she had bought and paid for the property with her separate estate.

Hence we think the judgment appealed from should be reversed, and a judgment ordered to be rendered in the court below in favor of the plaintiff, perpetually enjoining the defendants from selling the property seized under the execution.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded, with direction to the court below to render judgment in favor of plaintiff, perpetually enjoining defendants from selling the property seized under the execution.

[No. 11384. Department Two.—July 28, 1886.]

JAMES TEMPLE GOULD, RESPONDENT, *v.* F. D. LANTERMAN, APPELLANT.

STATE LANDS — APPLICATION FOR PURCHASE — APPROVAL BY SURVEYOR-GENERAL — SUBSEQUENT REFERENCE OF CONTEST FOR TRIAL. — The approval by the surveyor-general of an *ex parte* application for the purchase of state land, if brought about by the fraudulent representations of the applicant, who had never been an actual settler upon the land, or entitled to purchase it, does not bar a subsequent applicant of his statutory right to have the contest between him and the prior applicant referred to the proper court for adjudication.

ID. — ORDER FOR TRIAL — CERTIFICATE OF SURVEYOR-GENERAL. — *Eads v. Clarke*, 68 Cal. 481, affirmed to the effect that the Superior Court acquires jurisdiction of an action to determine such a contest, although the certified copy of the order for trial does not affirmatively show that the order was entered in a record-book in the office of the surveyor-general, if that officer certifies that the copy of the order is a copy of a document on file in his office.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order refusing a new trial.

The certificate of the surveyor-general referring the contest for trial recited the facts showing how the contest arose, and ordered that it be referred to the Superior Court of Los Angeles County for adjudication. The copy of the certificate offered in evidence on the trial, for the purpose of showing the jurisdiction of the court, was certified by the surveyor-general to the effect that it was a copy of a document on file in his office, and that it had been compared by him with the original, and was a correct transcript therefrom and of the whole thereof. The further facts are stated in the opinion.

. *Chapman & Hendrick*, for Appellant.

The surveyor-general had power to determine the defendant's application to purchase, and his determination is final. (Pol. Code, sec. 3414; *Berry v. Camonet*, 44 Cal. 348; *Powers v. Leith*, 53 Cal. 711; *Dilla v. Bohall*, 53 Cal. 709.)

Will D. Gould, J. S. Maltman, and W. W. Taylor, for Respondent.

The certified copy of the order for trial was sufficient to confer jurisdiction on the court. (*Eads v. Clarke*, 68 Cal. 481.)

FOOTE, C. — This was a contest as to which of two individuals was entitled to purchase land of the state of California.

The complaint was demurred to, and the demurrer overruled; a trial was then had before the court without a jury, and judgment was rendered for the plaintiff; from which, and an order denying a new trial, the defendant appeals.

He contends that the court had no jurisdiction to try the cause, because the certificate of the surveyor-general of the state, by virtue of which only, as he alleges, could such jurisdiction be obtained, was insufficient. A similar certificate in all respects was held by this court in *Eads v. Clarke*, 68 Cal. 481, to fully meet all the requirements of the statute, and the reasons for such decision as there given it is not necessary here to repeat.

It is further contended that as the complaint stated the surveyor-general had approved the defendant's application before the plaintiff made his, that such fact, showing judicial action by that officer in favor of the defendant, barred any right of the plaintiff to have his contest determined by any other court, and hence his complaint did not state facts sufficient to constitute a cause of action.

Inasmuch, however, as the complaint also and in the proper connection charged such action of the surveyor-general was brought about by the fraudulent representations made to him by the defendant, and that the latter had never been an actual settler upon the land in controversy, or entitled to purchase it, and that the surveyor-general, when a second application was made for the land, referred the matter as between the parties making the first and second applications for a contest by proper certificate to the proper court, we are of opinion that such contention is not well founded.

And we cannot well perceive how the action of the surveyor-general in granting an application upon a statement of facts made by the defendant alone would bar the plaintiff, who afterwards made an application to purchase the land, of a *statutory* right to have the contest between him and the defendant settled by the proper court.

The jurisdictional act of the land officer in such a case could not by granting such an application bind one who was not a party to a proceeding so entirely *ex parte*.

To hold to such a doctrine as that for which the defendant contends would be to nullify the statute, and to enable the surveyor-general, as *ex officio* register of the land-office, to oust the Superior Courts of the state of their jurisdiction over such contests as the one in hand, when there is no law which gives him such power, or repeals the statute allowing such a contest.

We are of opinion that the evidence justifies the findings of the court, and that findings were made upon all the material issues raised by the pleadings.

The judgment and order should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT. — For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 11465. Department Two.—July 28, 1886.]

ELIZA V. BURKLE ET AL., APPELLANTS, *v.* M. LEVY,
TRUSTEE, ET AL., RESPONDENTS.

DEBTOR AND CREDITOR — EXTENSION OF TIME FOR PAYMENT — MARRIED WOMAN — DEED OF TRUST — CONSIDERATION. — An extension of time given by a creditor to a debtor within which to pay his indebtedness, and an agreement by him to accept payment in installments, are sufficient considerations to support a deed of trust executed by the wife of the debtor on her separate property to secure the indebtedness.

ID. — CONTRACT OF MARRIED WOMAN — SECURITY FOR INDEBTEDNESS OF HUSBAND — RIGHTS OF CREDITORS. — Under section 158 of the Civil Code, a married woman may enter into any agreement or transaction respecting her property which she might if unmarried. She may mortgage or convey it by deed of trust to secure the debts of her husband, and having done so, his creditors may enforce their claims against it in the same manner and to the same extent that they could if it were his property, and not hers.

FRAUD — UNDUE INFLUENCE — RESCISSION OF CONTRACT — ACTION FOR — UNREASONABLE DELAY. — One whose consent to the execution of a contract has been obtained through fraud or undue influence may rescind the contract, but he must do so promptly on discovering the facts which entitle him to rescind. Under the circumstances of the present case, an unexplained delay of fifteen months in commencing the action after knowledge of the facts, held, unreasonable and fatal. Held further, that no fraud or undue influence was shown by the complaint.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion.

P. W. Dooner, for Appellants.

H. W. O'Melveny, and *Chapman & Hendrick*, for Respondents.

BELCHER, C. C. — This is an action to set aside a deed of trust executed by the plaintiffs to the defendant Levy, as trustee. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and their demurrer was sustained. The plaintiffs declined to amend, and thereupon judgment was entered against them.

Two points are made by the appellants: 1. That the plaintiff Eliza V. Burkle executed the deed of trust complained of without any consideration coming to her for so doing; and 2. That she was induced to execute the deed by the fraud and undue influence of her husband and co-plaintiff, Ferdinand Burkle, and of the defendant Levy.

1. It appears from the complaint that the plaintiffs were husband and wife, and that the property conveyed by the deed was a parcel of land in Los Angeles County, which was the separate property of the wife, and on which she had filed a homestead claim, and was residing with her husband. The husband was a merchant, and had become indebted to various parties in the aggregate sum of about three thousand dollars. The debts were all due, and the creditors were pressing for their payment. On the twenty-third day of May, 1884, the husband, in consideration of an extension of time to pay his debts being given him by his creditors, entered into a written agreement to pay them in twelve equal monthly installments, the first installment, of eight and one third per cent of the whole amount, to be paid on the thirty-first day of July, 1884, and a like sum on the last day of each month thereafter till the whole should be paid. At the same time, and as a part of the transaction, the plaintiffs executed to the defendant Levy, as trustee, the deed in question. The deed, a copy of which is set out in the complaint, recited the written agreement, and that it was made "in consideration of the said indebtedness, and of the extension of time for payment given, and in the further consideration of one dollar to them in hand paid by the party of the second part, the receipt of which is hereby acknowledged, and for the purpose of securing the payment of said sums as provided in said agreement under the provisions hereof." It then empowered the trustee, in case of default in making the payments as provided, to sell the property, and out of the proceeds of the sale to pay,—1. All expenses in-

curred in making the sale and any taxes he may have been compelled to pay on the premises; 2. To the "creditors mentioned in said agreement the sums therein specified, *pro rata*"; and 3. The balance or surplus, if any, to Ferdinand Burkle.

From this statement, it is apparent that there was a sufficient consideration for the execution of the deed.

The extension by the creditors of the time of payment, and the agreement by them to accept payments in monthly installments, were both valuable considerations, and sufficient to support the deed on the part of Mrs. Burkle, as well as on the part of her husband. The fact that the consideration did not go directly to her is a matter of no consequence. In this state, a married woman may enter into any engagement or transaction respecting her property which she might if unmarried. (Civ. Code, sec. 158.) She may mortgage it, or convey it by deed of trust, to secure her husband's debts, and having done so, the creditors may enforce their claims against it in the same manner and to the same extent that they could if it were his property, and not hers. (*Alexander v. Bouton*, 55 Cal. 15; *Cartan, McCarthy & Co. v. David*, 18 Nev. 310.)

2. To sustain the claim that Mrs. Burkle was induced to execute the deed by fraud and undue influence, it is alleged in the complaint that on the second day of May, 1884, her husband was arrested on a charge of felony, and compelled to leave his home and business; that he secured bail, and was again arrested and bailed on another charge; that two of his principal creditors were his bondsmen; that from the time of his release up to the 23d of May he was absent from his home and business a great portion of the time, consulting with his counsel and making arrangements for his examination; and she was informed by his attorneys and others that it would go hard with her husband, and that he would be very likely to suffer conviction and incarceration in the penitentiary; that

his creditors began to harass him for the payment of their demands, and he became discouraged, gloomy, and depressed, and communicated to her all his troubles and his apprehensions and fears, and frequently declared that his financial ruin was inevitable; that she believed all the reports and statements made to her concerning her husband's prospects, and became and was greatly agitated and under extreme mental anguish and excitement in consequence thereof; that on the morning of the 23d of May she was informed by her husband that his creditors had demanded a settlement, and that she and her husband convey to them the family homestead to secure the payment of their demands; that she hesitated to consent to the arrangement, and did not agree to sign the conveyance until she was informed by her husband that in case of her refusal his bondsmen would withdraw, and he would be immediately incarcerated in the county jail, and until she was further informed by him that the instrument demanded would not affect their homestead claim, and that in no event would she lose her home, and until she was informed by Levy that the instrument to be executed was not a deed in reality, but a mere security to satisfy the demands of her husband's creditors; that all the statements made to her by her husband, except that relating to the withdrawal of his bondsmen, were suggested and dictated by Levy, and that Levy acted in bad faith, with the view and for the purpose of securing an undue advantage over her, and that she was thereby imposed upon and deceived.

In all this we see nothing to support the claim of fraud and undue influence. It is not alleged that any of the statements made to Mrs. Burkle, and on which she acted, were untrue. She knew what the deed was and its purpose before she executed it. She acknowledged it before a notary, and on examination, without the hearing of her husband, was made acquainted with its contents. Levy

told her it was a mere security to satisfy her husband's creditors, and when her husband told her it would not affect her homestead claim, and that in no event could she lose her home, he must have intended, and she understood, that he could and would pay the installments as they became due, and so she would suffer no harm.

But if we are mistaken in this, another sufficient answer to the claim of appellants is found in the long delay in commencing the action. One whose consent to execute a contract has been obtained through fraud or undue influence may rescind the contract, but he must do it promptly on discovering the facts which entitle him to rescind. (Civ. Code, secs. 1689, 1691.) Here, as has been seen, the trust deed was executed on the twenty-third day of May, 1884, and this action was not commenced till the tenth day of October, 1885. There is nothing in the complaint to account for this long delay, and under the circumstances we must hold it unreasonable and fatal to this action. (*Barfield v. Price*, 40 Cal. 535.)

We think the demurrer was properly sustained, and that the judgment should be affirmed.

SEARLES, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 11164. Department Two.—July 28, 1886.]

F. G. FLANAGAN, APPELLANT, v. JOSEPH BROWN,
RESPONDENT.

AGENT FOR COLLECTION — RELEASE OF DEBT BY PRINCIPAL — PROMISSORY NOTE — ACTION ON BY AGENT. — Where the owner of a promissory note delivers it indorsed in blank to another, with power to manage, transfer, or dispose of it, under an agreement whereby its proceeds are to be equally divided between them, the

transferee is a mere agent for collection, and a release of the note subsequently executed by the owner to the payee is a defense to an action against him by the agent.

ID. — POWER COUPLED WITH INTEREST — REVOCATION OF AGENCY — CONSIDERATION. — In such a case, the power of the agent is not coupled with an interest within the meaning of section 2356 of the Civil Code, and may be revoked by the principal, notwithstanding the contract of agency was founded upon a valuable consideration.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion.

T. Z. Blakeman, for Appellant.

The relation established by the agreement between Conroy and Flanagan, conceding it to have been one of agency, was founded upon a valuable consideration, and could not be revoked by the principal. (*Story on Agency*. sec. 477; 1 Parsons on Contracts, 70; *Brown v. Pforr*, 38 Cal. 550; *Hunt v. Rousmanier*, 8 Wheat. 202; *Barr v. Schroeder*, 32 Cal. 617.) The plaintiff had a power coupled with an interest in the note. (*Davis v. Lane*, 10 N. H. 160; *Gaussin v. Morton*, 10 Barn. & C. 731; *Watson v. King*, 4 Camp. 272; *Matthiessen v. McMahon*, 38 N. J. L. 536; *Hill v. Day*, 34 N. J. Eq. 150; *Story on Agency*, sec. 496.)

James A. Waymire, for Respondent.

SEARLS, C. — This is an appeal from a judgment in favor of defendant, and from an order denying a new trial.

We are of opinion the judgment and order should be affirmed, for the reasons given by the learned judge who decided the case in the court below on the rendition of judgment, and which are as follows: —

“ This is an action on a promissory note for twenty-seven thousand dollars, executed by defendant September 4, 1876, payable four months after date, and bearing interest

at ten per cent per annum from maturity. The original holder of the note was the National Bank of the State of Missouri.

"At a sale of the assets of said bank, J. F. Conroy became the purchaser of the note in suit, paying therefor the sum of thirty-two dollars. Subsequently Conroy and the present plaintiff entered into an agreement reciting that, whereas Flanagan was the owner of thirty bonds of the St. Louis County Railroad, and Theodore W. Gaty (whose name was used for Conroy's) was the owner of the note in suit for twenty-seven thousand dollars, it was agreed that Gaty should place his note in the hands of Flanagan, so as to enable him to manage, transfer, or dispose of said bonds and said note. The agreement concludes in these words: 'All proceeds, money, or property realized from the transaction, after payment of expenses, shall be equally divided between the parties, but in no event shall said note be sold or disposed of for a sum of money or other property whereby a net sum shall be realized by said Gaty of less than \$250.'

"The action was commenced by Flanagan alone. Pending the action, the defendant, after some negotiation, obtained from Conroy a release, which by supplemental answer is set up as a bar to this action.

"The question to be determined is, Does this release from Conroy bar plaintiff's right of recovery? Defendant claims that Flanagan was a mere agent, whose authority was revocable at the pleasure of Conroy, his principal, and that Flanagan had no such right in the matter as would defeat Conroy's control of the property and his release of any claim thereon. Plaintiff claims that he is the owner of the legal title, and also of a one-half interest in the proceeds of the note.

"If plaintiff is the legal owner of the note, the ownership is not evidenced by the agreement hereinbefore referred to. No language of transfer or assignment is found therein. It does not appear therefrom that Con-

roy was parting with the ownership, or vesting the title in Flanagan. On the contrary, it appears that the note is referred to as Conroy's note, which is placed in Flanagan's hands to enable him to manage, transfer, or dispose of the same. This is language creating an agency. That it intended to create and does create an agency is not negatived by the fact that the subject of the agency is a promissory note rather than some other species of personal property. It seems to me that the mere temporary custody which a collector has of a promissory note indorsed in blank does not place him in a position to dispute as against his employer the question of ownership. Nor is he in position to say to the party liable on the note that a release obtained from the real and sole owner is not valid to defeat a recovery by the mere agent, who happens to be the custodian of the paper.

"The mere manual holding of the paper would give no right of action to a thief who might sue upon it. The entire destruction or loss of the paper would not bar a recovery by the real owner. The physical custody of the paper is a false element in the controversy to determine ownership as between a principal and his agent. It may be that it cuts a controlling figure as between the agent and the maker of the note when no question is made of the agent's right to represent and act for the owner. When the agent holds a note indorsed in blank, and sues upon it in behalf of his principal, it is no defense for the maker to say that the plaintiff in the suit is not the owner, and this, as I understand it, is all that is really decided in the case of *Curtiss v. Sprague*, 51 Cal. 241. There the defendant applied for a nonsuit, and the Supreme Court held that it was not error to deny the motion; and held further that it was error to join as plaintiff one who has assigned the note with the understanding that he should have half of the amount recovered. The agreement under which the note in suit was delivered to Curtiss, the plaintiff, was that he should bring

the suit, and divide the proceeds with his assignor. That case involved only a question of proper parties and pleadings; it did not deal with any question of release by the real owner of the claim in suit.

"In my judgment, that case is not to any extent determinative of the rights of the parties here. The agreement here says nothing of the right of Flanagan to bring any suit upon the note, nor of his right to control such suit when brought.

"Far less does the agreement divest the principal of the absolute ownership of the obligation represented by the paper. Flanagan's custody of that paper determines nothing as against Conroy's ownership of it, or the efficacy of Conroy's release of any obligation represented by it.

"If Flanagan has any standing, it must result from something else than his mere custody of the paper; he is not the owner of it; he is a mere agent intrusted with its custody; was he such an agent that his principal had not the right to revoke his authority?

"His authority was defined and limitated by the agreement signed by the parties. Article 6 of chapter 1 of title 9 of the Civil Code treats of the termination of agency. Section 2356 of that article is as follows: 'Unless the power of an agent is *coupled with an interest* in the *subject* of the agency, it is terminated as to every person having notice thereof by,— 1. Its revocation by the principal.'

"This language is not as broad as that found in some of the text-books which define the extent of the principal's right of revocation of the agent's authority. It does not include, as do many of the books, an agency given for a valuable consideration as one whose power is irrevocable. It makes use of language frequently found and construed in the text-books, and omits a portion of the limitations set on revocability. It seems to limit the principal's power of revocation to cases when

his agent is vested by his principal with an interest in the property itself which is the subject of the agency. The term 'power coupled with an interest' is well understood, and is discussed and defined in the very cases cited by the code commissioners under the section above referred to. These cases lay down the rule that a power coupled with an interest is where the grantee has an interest in the estate as well as in the exercise of the power. It is determined to exist or not accordingly as the agent is found to have such estate or not before the execution of the power. If his interest is only a right to share the proceeds which result from the execution of his power, the agent has not a power coupled with an interest.

"The case of *Brown v. Pforr*, 38 Cal. 550, recognizes the rule as to power coupled with an interest.

"There the agents had an interest to the extent of \$750 in the execution of the power conferred within the time named in their contract of agency, but they had no interest in the real estate which was the subject of the agency. Accordingly, the principal, even within the time limited in the contract, was held to be at liberty to revoke.

"But in stating the rule as to revocability, the language of Sanderson, J., is broader than the language of the code section above cited. He says: 'It is a general rule that any agency, whether to sell land or to do any other act, unless coupled with an interest, *or given for a valuable consideration*, is revocable at any time.' The words, 'or given for a valuable consideration,' as thus used in stating the rule by the Supreme Court in 1869, are not found in the code section as adopted in 1872. But the other words, 'power coupled with an interest,' are used, and presumably with the construction put upon them in that case.

"The case of *Hartley and Minor's Appeal*, 53 Pa. St. 212, is instructive in this connection.

"There was an ordinary agency, established by letter of attorney, to collect moneys that might be due the principal from the estate of her father. For their services the attorneys were to have one half of the net proceeds of what they might recover for her. The court there says:—

"‘The plaintiffs in error claimed that this clause [giving one half of the amount recovered] rendered the power irrevocable by the principal, under the idea that it was a power coupled with an interest. This was a mistake, as all the authorities show. To impart an irrevocable quality to a power of attorney in the absence of any express stipulation, and as the result of legal principles alone, there must co-exist with the power an interest in the thing or estate to be disposed of or managed under the power. . . . In the case in hand, the power and the interest could not co-exist. The interest the appellants would have would be in the net proceeds collected under the power, and the exercise of the power to collect the proceeds would be *ipso facto* to extinguish it entirely, or so far as exercised. Hence the appellants’ interest would properly begin when the power ended.’ The power was therefore held revocable.

"Flanagan, in the sense of the rule here laid down, and of the rule laid down by section 2356 of the code, was not the holder of a power coupled with an interest. If not, by the terms of that section his power was revocable, and his principal’s release is a good bar to this action.

"But even if the rule was broader than its terms as laid down in that section, and contemplated an agency given for a valuable consideration as irrevocable, I think there is much force in the suggestion of defendant’s counsel that in equity Conroy was the owner of the bonds as well as the note for which they were originally held as collateral. If that be so, the agreement as to the agency shows no valuable consideration passing from Flanagan to

Conroy, and the agency would not under any rule laid down on the subject be irrevocable.

"It results from these views that the release set up is a good bar to the action. If plaintiff has sustained any loss or damage through the action of his principal, he may look to him for damages. Judgment will be for defendant.

"SULLIVAN, J."

The other points made in the case cannot affect the result, and require no notice.

BELCHER, C. C., and FOOTE, C., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

[No. 8982. Department Two.—July 28, 1886.]

HENRY A. SANBORN, RESPONDENT, v. MADERA FLUME AND TRADING COMPANY, APPELLANT.

EMPLOYER AND EMPLOYEE — DEFECTIVE MACHINERY — LIABILITY OF MILL-OWNER. — It is the duty of the owner of a saw-mill to furnish suitable and safe machinery for the use of his employees, and he cannot divest himself of liability for injuries to an employee, caused by defective machinery, by intrusting the performance of that duty to his servants.

ID. — KNOWLEDGE BY EMPLOYER OF DEFECTS. — The owner of the mill is not liable for such injuries to an employee if the latter knew or had the means of knowledge of the defects in the machinery, and of the dangers and risks likely to result from its use.

ID. — DANGER OF EMPLOYMENT — INSTRUCTION. — The action was brought by an employee in a saw-mill against his employer to recover damages for injuries alleged to have been caused by defective machinery. The defendant requested the court to instruct the jury that "when a party works with or in the vicinity of a piece of machinery insufficient for the purpose for which it is employed, or for any reason unsafe, with a knowledge or means of knowledge of its condition, he takes the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries sustained arising out of accidents resulting from such defective condition of the machinery." *Held*, that the instruction was properly refused, as it failed to include as one of the conditions upon which the plaintiff could not maintain the ac-

tion that he knew or might have known that his employment involved danger to himself.

Id. — **NEGLIGENCE OF EMPLOYEE — QUESTION FOR JURY.** — In such an action, the question whether the plaintiff was negligent or not is one of fact for the jury, and the knowledge of the plaintiff of the detectiveness of the machinery is only one of the probative facts from which the ultimate fact of negligence must be determined.

Id. — **EXPERT IN SAW-MILLS — EVIDENCE.** — On the trial, a witness for the plaintiff testified in rebuttal, after showing himself qualified as an expert, that at the time of the accident the log being sawed did not pinch the saws, and that the machinery was being operated in the usual manner. *Held*, that the evidence was proper.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order refusing a new trial.

The facts are stated in the opinion.

McKisick & Rankin, and *McAllister & Bergin*, for Appellant.

If the sword was defective, and by its defects caused the accident, yet if the plaintiff knew of the defects, and after such knowledge continued to work, then he assumed the risk of the defects, and cannot recover in this action. (Civ. Code, sec. 1970; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 558; *Atchison, T. & S. F. R. R. Co. v. Plunkett*, 25 Kan. 201; *Flannagan v. C. & N. W. R. R. Co.*, 50 Wis. 470; *Sullivan v. India Mfg. Co.*, 113 Mass. 398; *Slater v. Jewett*, 85 N. Y. 66; *Jones v. Phillips*, 39 Ark. 17; *Dillon v. U. P. R. R. Co.*, 3 Dill. 323; *McGlynn v. Brodie*, 31 Cal. 376; *Sweeney v. C. P. R. R. Co.*, 57 Cal. 15; *Green etc. R'y Co v. Bresmer*, 97 Pa. St. 106; *Sowden v. Idaho Quartz M. Co.*, 55 Cal. 443; Thompson on Negligence, 1008, 1009; *Mansfield Coal Co. v. McEnergy*, 91 Pa. St. 194.)

D. M. Delmas, for Respondent.

The corporation owed the duty of furnishing its employees safe machinery. (*Beeson v. Green Mountain*, 57 Cal. 29.) It could not divest itself of this duty by delegating it to an employee. (*Brothers v. Carter*, 52 Mo. 372;

Fuller v. Jewett, 80 N. Y. 46; *Chicago v. Swift*, 45 Ill. 197; *Brabbits v. Chicago etc. R. R. Co.*, 38 Wis. 289.) The testimony of the witness Parkinson was admissible. (*Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Ward v. Salisbury*, 12 Ill. 369; *Spickerman v. Clark*, 9 Hun, 133; *Fenwick v. Bell*, 1 Car. & K. 312; *Bellefontaine v. Bailey*, 11 Ohio St. 333; *Blodgett v. Farmer*, 41 N. H. 398; *Chicago v. Greer*, 9 Wall. 726; *Dean v. McLean*, 48 Vt. 412; *Cooper v. Central etc. R. R.*, 44 Iowa, 134; *Cincinnati v. Smith*, 22 Chio St. 227; *Rust v. Eckler*, 41 N. Y. 488; *Leary v. Woodruff*, 19 Alb. L. J. 336.) Mere knowledge of the defects in the machinery, without knowledge of the danger resulting from the defects, is not sufficient to charge the plaintiff with negligence. (*Lasure v. Graniteville Mfg. Co.*, 18 S. C. 280; *Clark v. Holmes*, 7 Hurl. & N. 937; *Snow v. Housatonic R. R. Co.*, 8 Allen, 450; S. C. 85 Am. Dec. 720; *Cook v. St. Paul*, 32 Alb. L. J. 319; *Russell v. Minneapolis*, 32 Minn. 233; *Lawless v. Connecticut etc. R. R.* 136 Mass. 5; *Dorsey v. Phillips etc. Co.*, 42 Wis. 598; *Huddleton v. Lovell*. 106 Mass. 286; *Mayes v. Chicago etc. R. R. Co.*, 14 N. W. Rep. 340; *St. Joseph v. Chase*, 11 Kan. 58.)

BELCHER, C. C.—This is an appeal from a judgment in favor of plaintiff, and an order denying the defendant a new trial.

The action was brought to recover damages for injuries sustained by plaintiff while working as an employee about defendant's saw-mill, situate in the county of Fresno. It is alleged in the complaint that the injuries were caused by defective machinery used in the mill, and that the defects were known to the defendant, and unknown to the plaintiff. The answer denies that the alleged defects were known to the defendant, and alleges that they were known to the plaintiff, and that the injuries sustained by him were the direct result of his own negligence and the negligence of his fellow-servants.

It appears that when the accident happened the mill had been recently erected, and had been in operation only about ten days. It was put up by one Woodsum, acting as superintendent, and one White, acting as millwright. When it was nearly completed, White discovered that there was no "sword," and he so informed Woodsum. Woodsum directed him to make a temporary sword, and he did so out of a piece of old iron which he found in a neighboring mill. This temporary sword was put in the mill, and used till after the injury to the plaintiff.

The mill had two circular saws, and the sword was placed behind and in line with them, and about two or three inches distant from them, its function being to enter the cut made by the saws as the log moves onward, and to keep it from closing up and pinching the saws as they pass through it. A good sword, if it failed to enter the cut, would stop the on-moving log, and no injury would result. This temporary sword was not a good one, and was not safe. It was not stiff enough and not strong enough, and was too rough, and not true.

The injury to plaintiff was caused in this wise: There was upon the carriage a log eighteen inches square and fourteen feet long, which had been sawed into three pieces, each six inches thick, and technically called "cants." These cants were lying one on top of the other, and were to be sawed through again. When the carriage started they were carried forward and cut by the lower saw till they reached the line of the sword. The sword instead of entering the cut, as it should have done, struck the ends of the cants, and bent to one side. This caused the cants to deflect slightly from a right line, and this deflection cramped the lower saw. The teeth of this saw threw the cramping cants upward, and as they came up the teeth of the upper saw caught the topmost cant and hurled it back with great force. The projected cant stuck the foot of the plaintiff, who was standing at the

log-way, about forty feet distant, attending to his duties.

About the time the mill was started, the plaintiff was employed by Woodsum to act as foreman in the yard. His duties were to work on the log-way, look after the Chinese, change the men from place to place, and keep the mill running. He had nothing to do with the machinery; that was in charge of White, the millwright.

At the trial, it was claimed for the plaintiff that the accident was the result of the defectiveness of the sword, and we think the jury were justified in so finding.

It was also claimed that the defectiveness of the sword was chargeable to the negligence of the defendant, and we think the evidence fully sustained that position. When the sword was made, it was known by the mechanics who fashioned it to be a bad one and unsafe. But it was the duty of the defendant to furnish suitable and safe machinery, and it could not divest itself of liability by intrusting the performance of that duty to its servants. The rule upon this subject is correctly stated in *Fuller v. Jewell*, 80 N. Y. 52, where the court says "that acts which the master, as such, is bound to perform for the safety and protection of his employees cannot be delegated so as to exonerate the former from liability to a servant who is injured by the omission to perform the act or duty, or by its negligent performance, whether the nonfeasance or misfeasance is that of a superior officer, agent, or servant, or of a subordinate or inferior agent or servant, to whom the doing of the act or the performance of the duty has been committed. In either case, in respect to such act or duty, the servant who undertakes or omits, to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury. The act or omission is the act or omission of the master, irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to

act personally, or whether he did or did not do all that he personally could do by selecting competent servants, or otherwise to secure the safety of his employees." See also *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20.

The principal question presented for our consideration relates to the alleged negligence of the plaintiff. It is insisted for the appellant that if the plaintiff knew or had means of knowledge of the defects of the sword, and still voluntarily continued to work about the mill, he was guilty of such negligence as would prevent his recovering damages in the action. The court very clearly and pointedly instructed the jury that if the plaintiff knew or had the means of knowledge of the defects in the sword, and of the dangers and risks likely to result from its use, then he could not recover; but it refused to give an instruction asked by the defendant, as follows:—

"The general rule is, that an employer who provides machinery must see that it is suitable and fit for the use for which it is intended, but this rule does not require the owner of a saw-mill to adopt the latest improvements in its construction, nor does the relationship of employer and employee involve a guaranty by the employer of the employee's safety. When a party works with or in the vicinity of a piece of machinery insufficient for the purpose for which it is employed, or for any reason unsafe, with a knowledge or means of knowledge of its condition, he takes the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries sustained arising out of accidents resulting from such defective condition of the machinery."

We think the rule as stated by the court correct, and that the instruction asked was rightfully refused, because it failed to include as one of the conditions upon which the plaintiff could not maintain his action that he knew or might have known that his employment involved danger to himself.

Shearman and Redfield, in their work on Negligence, after stating in section 94 the general rule, that when the servant's action is founded on the assumption that the master ought to have known of the defect which caused the injury it is clearly a sufficient defense to show that the servant had equal means of knowledge, say, in section 95: "This rule has, however, been very properly held to be applicable only to such defects as the servant ought reasonably to have foreseen might endanger his safety. If a person of ordinary prudence would not have believed that the servant could in the regular discharge of his duties be injured by the defect, the servant may properly disregard it without losing his right to complain if while pursuing his ordinary course he suffers from such defect."

This rule was recognized in *Sweeney v. Central Pacific R. R. Co.*, 57 Cal. 15, and has been declared to be the true rule in many other cases.

In *Russell v. Minneapolis*, 32 Minn. 233, the court said: "We shall not here enter into any general discussion of the question when and under what circumstances a servant takes upon himself risks incident to the use of unsafe machinery by continuing to use it without objection after knowledge of its defective character. We simply say that it is not enough that the servant knew or ought to have known the actual character and condition of the defective instrumentalities furnished for his use. He must also have understood, or by the exercise of ordinary observation ought to have understood, the risks to which he is exposed by their use." And in a later case, *Cook v. St. Paul*, 32 Alb. L. J. 319, the same court said: "It is one thing to be aware of defects in the instrumentalities or plan furnished by the master for the performance of his services, and another thing to know or appreciate the risks resulting or which may follow from such defects. The mere fact that the servant knows the defects may not charge him with contributory

negligence or the assumption of the risks growing out of them. The question is, Did he know, or ought he to have known, in the exercise of ordinary common sense and prudence, that the risks, and not merely the defects, existed?"

In *Mayes v. Chicago, R. I. & P. R'y Co.*, 14 N. W. Rep. 340, the Supreme Court of Iowa said:—

"He must have known or possessed the means of knowing that the absence of the blocks was a defect causing danger to him and to others. It is very plain that to bring the case within the rule above stated, the intestate must have known, or in the exercise of reasonable diligence could have known, the dangers and perils resulting from the absence of the blocks. Now, if it should appear that the intestate, by reason of his lack of experience, did not know, or in the exercise of ordinary diligence could not know, of these perils and dangers, the law will not hold that he waived the negligence of defendant." (See also *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; S. C., 85 Am. Dec. 720; *Lawless v. Connecticut River R. R. Co.*, 136 Mass. 5; *Dorsey v. Phillips & C. Co.*, 42 Wis. 598; *Lazure v. Graniteville M. Co.*, 18 S. C. 28; Wharton on Negligence, sec. 217.)

Certain other instructions were given at the request of the plaintiff, and are claimed to have been erroneous; but we fail to see that they misstated the law of the case, or in any way prejudiced the defendant. In one of them the jury were told that if the sword was obviously insufficient and unsafe for the purposes for which it was intended and used, and that by reason of such insufficiency and unsafeness the accident happened, without any fault or negligence on plaintiff's part, he was entitled to a verdict; and in the other, that if the plaintiff was an employee of the defendant at its mill, and it was no part of his duty either to put up or keep in order the machinery of the mill, then, even if they should find that he knew that the sword which was alleged to have caused the

accident was defective, that fact alone did not, as a matter of law, charge him with negligence in undertaking or continuing his work at the mill; that such knowledge, if it existed, was merely a fact to be weighed by the jury in determining the ultimate question of his negligence.

It is urged that if the sword was "obviously insufficient and unsafe," then the plaintiff could not have been "without any fault or negligence." But why not? Notwithstanding the sword was obviously insufficient, and therefore known to the plaintiff to be unsafe, still he might not have known or had reason to suspect that it threatened danger to him; and in that case, as we have seen, he was not chargeable with negligence.

Whether the plaintiff was negligent, and so barred from recovering damages for his injury, or not, was a question of fact, and not of law, and the court properly instructed the jury that the plaintiff's knowledge of the defectiveness of the sword was only one of the probative facts from which they must determine upon the ultimate fact of his negligence.

It is also claimed that the court erred in permitting the witness W. F. Parkinson, when called in rebuttal, to answer certain questions asked by counsel for plaintiff. We are unable to see that the court erred in its rulings.

The witness had shown himself qualified to speak as an expert of saw-mill machinery, and the manner of operating it, and under the circumstances the question seems to us to have been pertinent and proper.

In our opinion, the judgment and order should be affirmed.

SEARLES, C., and FOOTE, C., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

[No. 11511. Department Two.—July 28, 1886.]

JAMES BETTNER, APPELLANT, *v.* L. M. HOLT, RESPONDENT.

LIBEL — BREACH OF TRUST BY AGENT — FALSE PUBLICATION CHARGING IS LIBELOUS — OBLOQUY. — The action was brought to recover damages for an alleged libel. The plaintiff, as the agent of certain residents of the town of Riverside, who were interested in the cultivation of fruit, had taken specimens of fruit grown by them for exhibition at the World's Fair in New Orleans. The alleged libel consisted in the publication in a newspaper of an article, quoted in the opinion, in which the conduct of the plaintiff as such agent was severely criticised. The complaint alleged that the article intended to charge, and was so understood by its readers, that the plaintiff, in violation of his trust, had corruptly failed to make a proper exhibit of fruit sent by the contributors, but had appropriated it himself, and entered it in his own name and for his own benefit; that the exhibit had not been conducted in an honorable or upright manner, and that he had failed to make any report of his actions as such agent, because the report, if given, would disclose his corrupt and dishonest acts. *Held*, that the article was calculated to expose the plaintiff to obloquy, and if false, was libelous.

ID. — OBLOQUY DEFINED. — To expose a person to obloquy is to expose him to censure and reproach.

APPEAL from a judgment of the Superior Court of San Bernardino County.

The facts are stated in the opinion.

Paris & Goodcell, for Appellant.

Curtis & Otis, for Respondent.

FOOTE, C.—Bettner brought an action against Holt for a libelous and unprivileged publication.

The complaint was demurred to as not stating facts sufficient to constitute a cause of action; the demurrer was sustained, and the plaintiff not having filed an amended complaint within the time allowed by the court, judgment for costs, etc., was given in favor of the defendant, from which the plaintiff has appealed.

The pleading which was on demurrer held insufficient is as follows:—

"The plaintiff for cause of action against the defendant alleges,—

"That the plaintiff and others, being at the time residents of Riverside and vicinity in this county, and largely interested in the raising of oranges and other fruits in that locality, sent a collection of such fruits to the World's Fair held at New Orleans in 1884-85, to be at such fair entered and exhibited for premiums; and this plaintiff and H. J. Rudisill attended such fair in charge of said fruit, as the agents and representatives of all such contributors, to see that said fruit was properly entered and exhibited at said World's Fair.

"That the plaintiff performed his duty as such agent and representative, and thereafter, on or about the — day of April, 1885, returned to his place of residence at said Riverside.

"That thereafter, on April 25, 1885, the defendant, being at the time the editor and publisher of a weekly newspaper published at said Riverside, and called the Press and Horticulturist, published in said newspaper, in a regular issue thereof of that date, an article entitled 'Intelligent Report from New Orleans' (referring to said World's Fair), in which article the defendant used and published the following language:—

"After a lapse of several weeks, we are enabled to publish a report from the citrus-fruit contest at New Orleans, in which Riverside and our readers generally throughout California are so universally interested. Although we had two representatives at New Orleans [meaning this plaintiff and H. J. Rudisill], and one of them [meaning this plaintiff] returned home with this information in his pocket two weeks ago, yet we had to wait till the Florida papers bring us this information, so that it could be given to our people, who furnished the fruit with which to make an exhibit,'— meaning the fruit in charge of this plaintiff and H. J. Rudisill aforesaid. Here followed in said article the report referred to.

"That in said issue of said newspaper, and side by side with said article, and commenting thereon, the defendant published another article, etc., entitled, 'A Little World's Fair History,' in which the defendant used and published the following language:—

"Eighty of our fruit-growers contributed 164 boxes of fruit, an average of more than two boxes each, and the exhibit was sent to New Orleans, Messrs. James Bettner and H. J. Rudisill going to take charge of the same [meaning the fruit sent by this plaintiff and others in charge of this plaintiff and H. J. Rudisill, as before in this complaint alleged].

"We have done our very best by telegraphing and making personal applications to get news for our readers, and up to the present time have got no report of what our representatives did at New Orleans, and hence have to depend entirely on Florida reports and Kimball Brothers of National City for news.

"We find that out of eighty contributors, only thirteen had any fruit entered for premiums, and out of *thirty-two* entries, James Bettner had *eleven* entered in his name.

"When it came to lemons, Mr. E. W. Holmes [meaning one of said contributors who had sent fruit in charge of this plaintiff and H. J. Rudisill] picked the very best he had to send to New Orleans, and yet with what he had left he took the premium at Riverside, but his lemons were not entered at all at New Orleans. R. P. Waite and scores of others whom we might mention [meaning others of said contributors] were also left out in the cold.

"Messrs. Kimball Brothers took an entire citrus fair to New Orleans, and were at liberty to enter any of the fruit therein contained in their own name for premiums; hence in making their selections they had an entire citrus fair to select from. In the Riverside exhibit, with few exceptions, Mr. Bettner was confined to his own exhibit of *eight* boxes from which to select fruit to make eleven entries and secure five premiums.

" ' We will say in this connection that the officers of the fruit company here in Riverside tried to conduct the exhibit in an honorable, upright manner, but the management got beyond their control. Those who shipped the fruit had a right to a report when Mr. Bettner returned, but not a word has he made public, and we don't blame him for not wanting to make one.'

" That by the use and publication of said words and language, used and published by the defendant as aforesaid, he intended to charge and assert, and to be understood as charging and asserting, and by the readers of said newspaper was in fact understood as charging and asserting, that this plaintiff, in violation of his trust as said agent and representative, had corruptly and dishonestly failed to make a proper entry or exhibit at said World's Fair of fruit sent by said contributors in his charge, but had himself appropriated fruit belonging to others of said contributors, and had entered and exhibited in his own name and for his own benefit fruit that he should have entered and exhibited in the name of and for the benefit of some other or others of said contributors; that the exhibit of fruit so sent from Riverside was not conducted in an honorable or upright manner, because of the corrupt and dishonorable action of this plaintiff as said agent and representative; and that plaintiff had refused to furnish information to said newspaper, or to make any report of his action as such agent and representative, and did not want to make such report because such information or report, if given or made, would disclose corrupt and dishonest conduct on the part of the plaintiff such as was charged by the defendant in said articles.

" That said charge, so made and published by the defendant, and so understood and by him intended to be understood by the readers of said newspaper, was and is false, scandalous, and unprivileged, and did and does expose the plaintiff to hatred, contempt, and obloquy, by im-

puting to him dishonesty and corruption in violation of his trust as said agent and representative.

"That said articles were so published by the defendant as editorials, with the apparent and express sanction and authority of the defendant as the editor and publisher of said newspaper; and said issue of said newspaper containing said articles was by the defendant widely circulated among the people of said Riverside and vicinity, and throughout this county and state, and elsewhere, and said articles were generally read by the subscribers of said newspaper and others, and were by them generally understood to have the sense and meaning aforesaid, and to charge the plaintiff with corrupt and dishonorable conduct, as hereinbefore stated.

"That the plaintiff has thereby been damaged in the sum of ten thousand dollars.

"Wherefore the plaintiff demands judgment against the defendant for the sum of ten thousand dollars and costs."

In the interpretation to be placed upon language charging the publication of a libel, a court of justice is to put such construction upon the words which it contains as may be derived "as well from the expressions used as from the whole scope and apparent object of the writer." (*Spencer v. Southwick*, 10 Johns. 259; *Cooper v. Greely*, 1 Denio, 358.)

And not only is the language employed to be regarded with reference to the actual words used, but according to the sense and meaning under all the circumstances attending the publication which such language may fairly be presumed to have conveyed to those to whom it was published. So that in such cases the language is uniformly to be regarded with what has been its effect, actual or presumed, and its sense is to be arrived at with the help of the cause and occasion of its publication.

And in passing upon the sufficiency of such language as stating a cause of action, a court is to place itself in

the situation of the hearer or reader, and determine the sense or meaning of the language of a complaint for libelous publication according to its natural and popular construction. (Townshend on Libel and Slander, sec. 133.)

Applying the rules thus laid down to the construction of the publication complained of, as set out in the pleading, and taking in connection with it the other matters set out in the complaint, it seems evident that the plaintiff was charged with having been guilty of conduct which was calculated and did expose him to obloquy, as one untrue to a trust reposed in him by his fellow-citizens at Riverside, and elsewhere, and if the charge was false, it was libelous.

To expose one to obloquy is to expose him to censure and reproach, as the latter terms are synonymous with the word "obloquy."

If under all the facts and circumstances as set out in the publication, taken together with those stated in connection with it in the complaint, plaintiff was not exposed to the censure and reproach of those at Riverside and elsewhere who read or heard read the publication concerning him, by some of whom it was alleged he had been trusted in an important matter, then we are mistaken both in the temper and disposition of men in like circumstances, and in the fair and unstrained interpretation of the language of that publication.

The complaint was sufficient under section 45 of the Civil Code.

The judgment should be reversed and cause remanded with permission to the defendant to answer the complaint if so advised.

BELCHER, C. C., and SEARLS, C., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded, with permission to defendant to answer the complaint if so advised.

[No. 11438. Department Two.—July 28, 1886.]

M. M. GREEN, APPELLANT, *v.* R. Y. HAYES ET AL., RESPONDENTS.

INDEMNITY SCHOOL LANDS — DEFECTIVE SELECTIONS — CONFIRMATION TO STATE — PREVIOUS SETTLEMENT — GOOD FAITH OF SETTLER — DECISION OF INTERIOR DEPARTMENT. — Under the act of Congress of March 1, 1877, confirming to the state the title to indemnity school lands the selections of which were defective or invalid, but excepting from the confirmation lands on which a *bona fide* pre-emption or homestead settlement had been made previous to the certification to the state, the question of the *bona fides* of such a previous settlement is one of fact, or of mixed law and fact, and the decision of the department of the interior thereon in a case involving the question is final.

ID. — PATENTEE FROM STATE — ACTION TO QUIET TITLE AGAINST — ALLEGATIONS OF FRAUD. — In an action by an alleged pre-emptor of such land, claiming title under a previous settlement, to quiet his title, as against a patentee from the state, and to have the title of the latter declared void on the ground that his application to purchase the land from the state was fraudulent, the facts constituting the fraud must be specifically alleged in the complaint.

ID. — DEFECTIVE APPLICATION TO PURCHASE — IMPEACHMENT OF PATENT — STATE TITLE. — In such an action, the plaintiff cannot question the validity of the patent to the defendant on the ground that his application to purchase was defective or irregular, because he is not seeking to obtain the title of the state.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion.

F. H. Howard, Will D. Gould, and James H. Blanchard, for Appellant.

Wells, Van Dyke & Lee, C. E. Thom, and H. T. Hazard, for Respondents.

BELCHER, C. C. — The only question presented in this case is as to the sufficiency of the complaint when tested by a general demurrer.

The action was brought to quiet the plaintiff's title to eighty acres of land in Los Angeles County, and the material facts alleged in the complaint are as follows:—

In March, 1868, one Andrew Jaughin made application to purchase the land in question from the state of California under the provisions of an act of the legislature passed April 27, 1863, and entitled "An act to provide for the sale of certain lands belonging to the state." His application was not made in conformity to the provisions of that act, and was fraudulent and known to be so, when it was presented to the state locating agent for acceptance and approval. The land was within the exterior limits of a Mexican grant which had been regularly presented to and confirmed by the board of land commissioners and the United States courts, and it remained so, and was claimed by the Mexican grantees until the thirty-first day of October, 1871. The land was sought to be taken in lieu of a part of a sixteenth section, which at the time of the application was also within the limits of a Mexican grant, and had not, by final survey of the grant or otherwise, been ascertained or determined to be lost to the state.

Knowing all these facts, the state locating agent, conspiring with Jaughin to unlawfully divest the United States of the title to the land, fraudulently accepted the application, and on the 22d of April, 1868, selected and located the land in question in the name of the state of California, and for the benefit of Jaughin, as indemnity school land.

In May, 1870; the land was unimproved, uncultivated, and vacant public land; and on the sixth day of that month the plaintiff, being then a qualified pre-emptor, settled thereon as a pre-emption settler, with the intention of availing himself of the pre-emption laws of the United States, and erected a dwelling-house and made other valuable improvements thereon. After his settlement, and while the state selection and location was pending before the land department, he, by his attorneys, notified in writing the commissioner of the general land-office and Secretary of the Interior of his claim, and par-

ticularly called attention to the defects and illegalities of the state selection and location; but notwithstanding such notification, the commissioner and secretary approved the location, and listed the land to the state as indemnity school land, before the land in lieu of which it was taken was known to be lost to the state. Jaughin obtained a certificate of purchase for the land from the proper officers of the state, and assigned the same to R. Y. Hayes.

Hayes obtained a patent for the land from the state, and died. The defendants are his successors in interest.

The plat of the township in which the land is situated was first regularly and legally filed in the local land-office on the twenty-first day of November, 1871, and on the next day the plaintiff filed with the register and receiver his declaratory statement, and paid them the fees required therefor. Afterwards, having fully complied with the pre-emption laws, he offered to make proof before them of his settlement and improvements and residence upon the land, and his qualifications as a pre-emptor, and tendered the government price for the land, with all necessary fees; but the register and receiver rejected his tender of proofs and payment, and refused to allow him to enter the land because of the indemnity school selection, and for no other reason. Plaintiff appealed from the decision of the register and receiver to the commissioner of the general land-office, and afterwards, on the tenth day of March, 1876, the Secretary of the Interior made a decision to the effect that the list to the state was invalid and void, and no bar to the claim of the plaintiff. The plaintiff then, on the fourth day of April following, again appeared in the local land-office and proved up his claim, paid for and entered the land, and received his duplicate receipt. Afterwards, the Secretary of the Interior ordered a rehearing of the case to be had, in order that the state of California might appear and contest the plaintiff's right to the land.

A rehearing was had on the twenty-third day of July, 1877, and the state, by its attorney, appeared and contested the plaintiff's rights. Full proofs were taken, and as a result, the department of the interior found all the facts to be as claimed by plaintiff, but decided that the plaintiff was not entitled to the land, because at the time he made his settlement upon it as a pre-emptor he had knowledge of the fraudulent and void claim of Jaughin thereto.

It is then alleged that the decision of the secretary was erroneous, and that it was upon a question of law, and not of fact, that the claim of Jaughin was in fact no bar to plaintiff's pre-emption claim.

The court below sustained a demurrer to the complaint; and we think it did so properly.

On March 1, 1877, an act was passed by Congress entitled "An act relating to indemnity school selections in the state of California," and commonly known as the Booth Act. (19 U. S. Stats. 267.)

By the first section of the act, "the title to the lands certified to the state of California known as indemnity school selections, which lands were selected in lieu of sixteenth and thirty-sixth sections, lying within Mexican grants, of which grants the final survey had not been made at the date of such selection by said state," was confirmed to the state.

By the second section of the act it is provided "that when indemnity school selections have been made and certified to said state, and said selections shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth and thirty-sixth sections in lieu of which the selection was made shall, upon being excluded from such final survey, be disposed of as other public lands of the United States; *provided*, that if there be no such sixteenth or thirty-sixth section, and if

the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land-office, and shall be allowed to purchase the same at \$1.25 per acre, not to exceed three hundred and twenty acres for any one person; *provided*, that if such person shall neglect or refuse after knowledge of such facts, to furnish such proof and make payment for such land, it shall be subject to the general land laws of the United States.

By this section, Congress confirmed to the state such indemnity school selections as had been made and certified to it, and which would fail by reason of the land in lieu of which they were taken not being included within the final survey of a Mexican grant, "or are otherwise defective or invalid." (*Martin v. Durand*, 63 Cal. 39.)

It was then further provided in the act that the confirmation should not apply to mineral lands, etc., nor extend to the lands settled upon by any actual settler claiming the right to enter, not exceeding the prescribed legal quantity under the homestead or pre-emption laws; *provided*, that such settlement was made in *good faith* upon lands not occupied by the settlement or improvement of any other person, and prior to the date of certification of the lands to the state by the department of the interior; *and provided further*, that the claim of such settler should be presented to the register and receiver of the district land-office, together with the proper proof of his settlement and residence, within a given time.

It is clear that the land in question was confirmed to the state by this act if the plaintiff's settlement upon it was not made in good faith, and when it was not occupied by the settlement or improvements of any other person.

When the case was heard before the department of the interior, and all the facts were presented, that department decided that the plaintiff was not entitled to the land.

What the facts were which were presented before the department we are not advised, but it is evident the decision must have been made upon the ground that plaintiff's settlement was not made in good faith, he knowing at the time of Jaughin's claim. Whether it was made in good faith or not was a question of fact, or at any rate a mixed question of law and fact, and the decision of the department upon it was final.

"It would lead to endless litigation and be fruitful of evil if a supervisory power were vested in the courts over the action of the numerous officers of the land department on mere question of fact presented for their determination." (*Quinby v. Conlan*, 104 U. S. 426.)

"It is a sound principle that when there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive." (*Marquez v. Frisbie*, 101 U. S. 476.)

There are many averments in the complaint of fraud, conspiracy, and fraudulent acts on the part of the defendant's grantor, but they cannot be regarded, because there are no particulars of the fraud showing what it was, and how it was perpetrated. (*United States v. Atherton*, 102 U. S. 372; *Semple v. Hagar*, 27 Cal. 163; *Kent v. Snyder*, 30 Cal. 666.)

Besides, whatever defects or irregularities there may have been in Jaughin's application to purchase the land from the state, they were cured by the issuance of the patent, and cannot be called in question in this action, where the plaintiff is not seeking to obtain the state's title.

The judgment should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 11048. In Bank.—July 28, 1886.]

ANNIE SCHUYLER, RESPONDENT, *v.* R. J. BROUGHTON, SHERIFF, ETC., APPELLANT.

HUSBAND AND WIFE — DEED TO MARRIED WOMAN — COMMUNITY PROPERTY — PRESUMPTION. — Real property conveyed to a married woman by a deed which shows on its face a consideration paid by her is presumed to have been purchased with community funds, and to be community property, and as such is liable for the debts of the husband. The presumption may be overcome by extrinsic proof that the consideration paid was the separate funds of the wife; but in the absence of such evidence, the presumption is absolute and conclusive.

Id. — MONEY BORROWED BY MARRIED WOMAN — INVESTMENT OF. — Money borrowed by a married woman to invest in real property during her marriage is community property, unless it be borrowed by her upon the faith of her existing separate property, which she mortgages or pledges as security for its payment, or against which her contract may be enforced.

Id. — CONSIDERATION FOR PURCHASE — PARTLY SEPARATE AND PARTLY BORROWED MONEY. — Real property purchased by a married woman in her own name, partly with money belonging to her separate funds, and partly with money borrowed by her for that purpose, becomes in part the separate property of the wife, and in part community property. In such a case, the wife becomes a tenant in common of the land with her husband in the proportion that the separate funds paid by her bear to the whole purchase price.

Id. — COMMUNITY INTEREST LIABLE FOR HUSBAND'S DEBTS. — Lands so purchased, so far as they are community property, may be taken in satisfaction of an execution against the husband.

APPEAL from a judgment of the Superior Court of Santa Barbara County.

The facts are stated in the opinion of the court.

B. F. Thomas, for Appellant.

W. C. Stratton, for Respondent.

MCKEE, J. — By an execution issued upon a money judgment recovered on the 18th of February, 1884, by Henry Miller against W. H. Schuyler, the sheriff of Santa Barbara County levied upon a tract of land as the property of the judgment debtor. The land was afterward sold at execution sale according to law to the

judgment creditor, to whom the sheriff issued a certificate of sale, which entitled the purchaser to a deed if the land was not redeemed from the sale within the time allowed by law for that purpose. No redemption having been made within statutory time, the sheriff was about to execute and deliver to the purchaser a deed, when the plaintiff in this action, who is the wife of the judgment debtor, sued out an injunction to restrain the sheriff from executing and delivering such a deed, upon the ground that the land is her separate property, and was not subject to the judgment and execution against her husband, and that the deed, if executed and delivered, will create a cloud upon her title.

Admittedly, the land was acquired by the wife during marriage, and after the rendition of the judgment against her husband. But it was conveyed to her in her own name by a deed which on its face showed a consideration paid by the wife, and did not show that the land was conveyed to her to hold as her separate property.

Where real property has been conveyed to a married woman by a deed which shows on its face a consideration paid by her, the legal presumption is that the property was purchased by community funds, and became community property of the husband and wife; and as such it is liable for the debts of the husband. (*Riley v. Pehl*, 23 Cal. 70; *Ramsdell v. Fuller*, 28 Cal. 38; S. C. 87 Am. Dec. 103; *Peck v. Vandenberg*, 30 Cal. 11; *Peck v. Brum-magim*, 31 Cal. 440; S. C., 89 Am. Dec. 195; *Vassault v. Austin*, 36 Cal. 691.)

It is true that the legal presumption which arises from the face of the deed may be overcome by extrinsic proof that the consideration paid was the separate funds of the wife (*McDonald v. Badger*, 23 Cal. 393; *Austin v. Frught*, 23 Cal. 241; *Landers v. Bolton*, 26 Cal. 393); but in the absence of such proof, the presumption is absolute and conclusive. (*Pixley v. Huggins*, 15 Cal. 129.) Presumptively, therefore, the land in controversy was the

common property of the husband and wife, and subject to the judgment and execution against the husband.

To overcome that presumption in this case, it was proved at the trial, and the court finds, that the wife purchased the property on the 16th of May, 1883, and paid therefor the sum of nine hundred dollars.

"That two hundred dollars of said money was acquired by plaintiff by gift and descent, and seven hundred dollars thereof was borrowed by her of her sister, who loaned the same to her for the purpose of paying a part of the purchase price of said real property; and plaintiff gave to her said sister a promissory note and mortgage upon said real property for the amount so borrowed, no part of which has been paid.

"That said W. H. Schuyler, the husband of plaintiff, did not sign said note or mortgage, and no part of the money paid for said real property was the separate property of said W. H. Schuyler, and no part of the money so paid was the community property of said W. H. Schuyler and plaintiff."

There is no doubt that property acquired after marriage by either husband or wife, by gift, bequest, devise, or descent, with its rents, issues, and profits, is the separate property of the spouse who acquires it (Deering's Annotated Civil Code, secs. 162, 163); and that all other property acquired after marriage by either husband or wife, or both, is community property. (Deering's Annotated Civil Code, secs. 164, 687.) The sum of two hundred dollars, which the plaintiff, as the wife of W. H. Schuyler, acquired by gift, was therefore her separate property, and the land in which she invested that money was to the extent of the investment her separate real property. But the sum of seven hundred dollars, which she borrowed, was not acquired by gift, bequest, devise, or descent, nor was it rents, issues, or profits of property so acquired; it was money acquired by contract.

By the code law, a married woman is qualified to enter

into contracts as freely as if she were unmarried (Civ. Code, sec. 158), and the obligation which springs from any contract she makes is enforceable against her out of her separate property. (Civ. Code, sec. 170.) It follows that a married woman may borrow money to invest in real property, but money borrowed by her for that purpose during marriage will be regarded in law as community property, unless it be borrowed by her upon the faith of existing separate property belonging to her, which she mortgages or pledges as security for its payment, or against which her contract may be enforced.

In this case the money borrowed by the wife was not secured by mortgage lien or otherwise upon existing separate property of the wife. It appears that she had no separate property other than the two hundred dollars before she purchased the land. Under these circumstances she borrowed the seven hundred dollars, "for the purpose of paying a part of the purchase price of said real property." The money borrowed was therefore common property, and to the extent of the common fund the land in which she invested it was also common property, against which her separate contracts could not be enforced. (Civ. Code, sec. 170.)

We have, then, a case arising out of a transaction by a married woman, in which she purchased a tract of land in part with money belonging to her separate funds, and in part with money belonging to the community funds; so that the land became in part separate property of the wife, and in part common property of the husband and wife. Under the law, a husband and wife may acquire and hold real property in joint tenancy, tenancy in common, or as common property. (Civ. Code, sec. 161.) By the purchase, the wife therefore became a tenant in common of the land with her husband in proportion of the separate estate to the whole purchase price. (*Ewald v. Corbett*, 32 Cal. 498; *Estate of Holbert*, 57 Ind. 259.)

Such being the case, the execution upon the judgment

against the husband ran against his interest in the land; and the purchaser at the execution sale became substituted to and acquired whatever interest the execution debtor had in the land (Civ. Code, sec. 700); so that he was legally entitled to a conveyance. It follows that the court below erred in holding "that no part of the money paid for the purchase of the land was common property."

Judgment and order reversed and cause remanded.

Ross, J., SHARPSTEIN, J., and THORNTON, J., concurred.

Rehearing denied.

[No. 11250. In Bank.—July 28, 1886.]

W. F. EDGAR ET AL., RESPONDENTS, v. H. J. STEVENSON, APPELLANT.

PRACTICE — AMENDMENT TO ANSWER. — The refusal to allow a defendant to file an amended answer setting up matters which could be proved under the averments of the original answer is not erroneous.

ID. — FINDING — PARTY DESIRING CANNOT DICTATE. — A party desiring a finding upon a particular point should specify the point to the court without dictating the terms of the finding; and the refusal of the court to make certain findings presented to it as facts in the case is not erroneous.

ID. — CONFLICT OF EVIDENCE. — Where the evidence is conflicting, a finding will not be disturbed on the ground of the insufficiency of the evidence to justify it.

WATER RIGHTS — RIPARIAN PROPRIETOR — USE OF STREAM — ORDINARY FLOW — APPROPRIATION — DIVERSION OF SURPLUS. — A riparian proprietor, who has appropriated and uses all the water of a stream crossing his land, is it ordinarily flows, cannot restrain the diversion, during times of extraordinary high water, of the surplus of the stream not used or appropriated by him.

APPEAL from a judgment of the Superior Court of San Bernardino County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Henry M. Willis, and Rowell & Rowell, for Appellant.

To entitle the plaintiffs to an injunction, the diversion must be such as to create a perceptible diminution of the stream, and deprive the plaintiffs of what they were entitled to, and cause them injury. (Gould on Waters, secs. 213, 214; Angell on Watercourses, 199; *Cooper v. Hall*. 5 Ohio, 321; *Moore v. Clear Lake W. Co.*, 68 Cal. 146; *Creighton v. Kawayah Canal Co.*, 67 Cal. 221; *Elliot v. Fitchburg R. R. Co.*, 10 Cush. 191; S. C., 57 Am. Dec. 85.)

Curtis & Otis, and Byron Waters, for Respondents.

THORNTON, J.—This is an action for an injunction to restrain the diversion of water.

We cannot perceive that the defendant was injured by the refusal of the court below to allow him to file an amended answer. The matters averred in the amended answer might all have been proved under the answer originally filed. Error without injury affords no ground for reversal.

The defendant presented to the court certain findings, and asked the court "to find the same as facts in the case," which the court refused, and defendant excepted.

That this is not error we consider clearly settled in this court by the cases of *Hidden v. Jordan*, 28 Cal. 304, and *Miller v. Steen*, 30 Cal. 402, S. C., 89 Am. Dec. 124. See *Porter v. Woodward*, 57 Cal. 537, 538. It was held in *Miller v. Steen, supra*, that a party requiring a finding upon a particular point should specify the point, without dictating the terms of the finding. The right of the party is only to specify or suggest the point on which a finding is required. (See cases above cited.) For the above reasons, we hold that the court below did not err in refusing to find as facts in the case the findings presented.

The evidence as to the issue whether there was a continuous watercourse through the lands of plaintiffs was conflicting; and in accordance with the well-settled rule

of this court, there can be no reversal on the ground of insufficiency of the evidence to justify the finding on that point.

The court made the following findings:—

“ 1. That the plaintiffs are the owners and in possession of, and their grantors, ancestors, and predecessors have been all the time since March, 1859, the owners of and in the possession of, the land and premises described in the complaint herein.

“ 2. That for more than twenty years immediately preceding the commencement of this action, the plaintiffs, and their grantors, ancestors, and predecessors in interest, have cultivated the aforesaid land in orchard, vineyard, and usual annual crops, and are still so doing.

“ 3. That there is, and has been from time immemorial, a natural stream of water, sometimes known as Little San Gorgonio Creek, and sometimes called Edgar Creek, which is the same that is designated in the complaint as Edgar Creek, which has its source in the mountains northerly from said land of plaintiffs, and flows in its natural course to, upon, and across the aforesaid land of plaintiffs; said stream, before it reaches said land of plaintiffs, sinks in the sand at several places, and rises again and flows above the ground, but it is one continuous, well-defined stream and watercourse until after it crosses and passes upon and over and across said land of plaintiffs.

“ 4. That for many years last past, and prior to the diversion of the waters of the said stream by the defendant as alleged in the complaint, and until such diversion, the plaintiffs, their grantors, ancestors, and predecessors, have continuously appropriated and used all the water of said stream upon their said land and premises for domestic and household purposes and irrigating their said land, except during times, very seldom occurring, of extraordinary high water or freshets, and the use of the whole thereof in its ordinary flow, and with the excep-

tions aforesaid, has always been since so appropriated and used by plaintiffs, their grantors, ancestors, and predeces-sors, and now is necessary for the proper irrigation and cultivation of said land of plaintiffs, and for domestic and household use thereon.

" 5. That at the time the defendant diverted the waters of said stream as alleged in the complaint, and ever since until now, there has been and is flowing therein an unusually large quantity of water, by reason of the unusually heavy rains during the last winter and spring, and more than a sufficient quantity for the proper irri-gation and cultivation of said land of plaintiffs, and for domestic and household or any beneficial use thereon, and sufficient for all such purposes, over and above the amount of water diverted by the defendant.

" 6. That the water diverted by the defendant as mentioned in the complaint, and also in the answer of defendant, is water of the stream described in the com-plaint and designated therein as Edgar Creek, and in the answer as Little San Gorgonio Creek, and would in its natural course, if not so diverted by defendant, flow down to and upon and across the said land of plaintiffs, and during the ordinary flow of the stream, to wit, ex-cept during extraordinary high water or freshets, the amount of water diverted by the defendant would nat-urally diminish the quantity flowing to and upon and across the land of plaintiffs, and thereby cause great in-jury to and destruction of the orchard trees, vines, and crops growing thereon, and great and irreparable damage to plaintiffs."

It will be observed that the court finds that for many years last past, and prior to the diversion of the waters of the stream in controversy by defendant, the plaintiffs and those under whom they claim have continuously appropriated and used all the water of said stream upon their lands and premises for domestic and household purposes and for irrigating their land, except during

times of extraordinary high water or freshets, and that the use of the whole *in its ordinary flow*, and with the exceptions aforesaid, has always been so appropriated and used by plaintiffs and those under whom they claim, and is necessary for the proper irrigation and cultivation of the land of plaintiffs, and for domestic and household use thereon.

By examination of finding 5, it will be observed that the defendant has not diverted any of the ordinary flow of the stream, but only during freshets, when the stream was swollen by reason of unusually heavy rains, and though such diversion was made by defendant, still sufficient was left for all the needs of plaintiffs, and all that was appropriated by them.

It thus appears that the defendant has only diverted the surplus which was not used and not appropriated by plaintiffs. That the plaintiffs are not entitled to an injunction restraining defendant from using such surplus is sustained by the ruling in the following cases; *Brown v. Smith*, 10 Cal. 510; *Ortman v. Dixon*, 13 Cal. 39; *McKinney v. Smith*, 21 Cal. 374; *N. C. & S. C. Co. v. Kidd*, 37 Cal. 313; and *Smith v. O'Hara*, 43 Cal. 375, 376.

The following observations, taken from the opinion of the court speaking by Sawyer, C. J., in the case above cited (*N. C. & S. C. Co. v. Kidd, supra*), are applicable here: "That the mere diversion or use of water by another is no injury to a party claiming till he is in a position to use it himself, and even after he has acquired a right, during any cessation of his ability, to use it, is settled by many cases. Nor is such diversion or use, or the diversion or use of any surplus beyond the amount which the claimant has ability to use, actionable. Thus in *Brown v. Smith*, 10 Cal. 510, an action for the diversion of water from Brown's ditch, which had the prior right, it was held that if 'Brown's old ditch, so called, was so filled with tailings during the winter season of 1857 that it was incapable of diverting any of the waters

of Rabbit Creek, then plaintiff cannot recover for loss of water from that ditch.' And again, in *Ortman v. Dixon*, 13 Cal. 39: ² He was entitled to all whenever all was necessary for the mill, but whenever the mill did not need or could not use it for its operations, the defendant could use it for his purposes.' *McKinney v. Smith*, 21 Cal. 381, recognizes the same principle."

The court below, in our judgment, found that defendant did not divert and never diverted any of the waters appropriated, used, or needed by the plaintiffs, and rendered a judgment enjoining defendant from using the surplus not appropriated which he had a right to use.

In this judgment, it went beyond what was authorized by the findings. A judgment restraining defendant from using any of the waters of the stream at its ordinary flow would be proper under the findings.

The judgment should therefore be reversed and the cause remanded, with directions so to modify the judgment as to restrain the defendant from diverting any of the waters of the stream referred to in said judgment at its ordinary flow.

Ordered accordingly.

MYRICK, J., MCKEE, J., SHARPSTEIN, J., and MORRISON, C. J., concurred.

[No. 20202. In Bank.—July 30, 1886.]

EX PARTE THOMAS P. WINTER, ON HABEAS CORPUS.

ACTION FOR SUPPORT AND MAINTENANCE — COUNSEL FEES FOR PROSECUTION OF APPEAL — TRIAL COURT MAY ORDER. — In an action by a wife against a husband for permanent support and maintenance, after an appeal has been taken by the defendant from an order made *pendente lite*, directing him to pay counsel fees to the plaintiff, the trial court has power, within the bounds of a proper discretion, to order him to pay further counsel fees on appeal.

APPLICATION for a writ of *habeas corpus*. The facts are stated in the opinion.

George D. Collins, and Eugene N. Deuprey, for Petitioner.

Tyler & Tyler, contra.

FOOTE, C.—A wife brought an action against her husband for permanent support and maintenance. The court *pendente lite*, upon application by the plaintiff, made an order for the defendant to pay counsel for her use \$250 as counsel fees,—it appearing that he was amply able to do so, and she having no means otherwise to prosecute her action.

From that order the defendant appealed, and that appeal is still pending in this court.

Afterwards, the court below, on motion duly made, ordered the defendant to pay the further sum of \$250 counsel fees to the plaintiff's counsel for her use, in order that she might prosecute her action then upon appeal as aforesaid.

The defendant failing and refusing to obey that order of the court, or to appeal therefrom, he was ordered to show cause why he should not be committed for contempt in disobeying such order.

Upon the hearing in the matter, it appeared that the plaintiff had no money or property, and that the defendant had community property and funds in his hands amounting to several thousand dollars, and that it was necessary that the plaintiff should be furnished with money to enable her to answer the appeal from the first order commanding the payment of counsel fees by the defendant as aforesaid, and that the sum of \$250 was a reasonable amount for that purpose, and that the defendant was amply able to pay the same. Whereupon the court ordered the defendant to pay to plaintiff's counsel for her use the sum of \$250 within one day of the date of the service upon him of a copy of said order.

The order last mentioned was not complied with, or any appeal taken therefrom.

The motion for contempt against the defendant then

came on to be heard, and the defendant appeared by his counsel; it was then shown that a copy of the order of date March 3d had been duly served upon the defendant upon that day, and demand made upon him for the payment of the sum of money mentioned therein; that the defendant was able to pay the same, but refused to do so, showing no cause for such refusal, his counsel contending that the trial court had no power or authority to make or to enforce its order in the premises.

An order was then made, of date the eleventh day of March, 1886, adjudging the defendant guilty of contempt for his disobedience of said order of March 3, 1886, and ordering him to pay a fine of five dollars; and it further appearing that said defendant was still able to pay the sum of money mentioned in said order of March 3, 1886, he was ordered to be taken into the custody of the sheriff of the city and county of San Francisco, and to be imprisoned in the county jail thereof until he complied with the order of the court in the premises.

On the twenty-second day of April, 1886, the defendant applied for and obtained from the chief justice of this court a writ of *habeas corpus* directed to Peter Hopkins, the sheriff aforesaid, and the defendant was admitted to bail pending the determination of his application to be discharged from custody.

To us it appears that the learned judge below was by law vested with the power, within the bounds of a proper discretion, to make the order for the payment by the defendant of the sum of \$250 counsel fees to enable his wife, who was without any means or property, otherwise than as obtained from him, to prosecute her action then on appeal.

No abuse of that discretion is shown by the record. The defendant has all the community property in his possession, and seeks to retain it in defiance of a legal order of the court to furnish therefrom his destitute consort with the means to pay counsel to represent her in

this court. Under the decision in the case of *Reilly v. Reilly*, 60 Cal. 625, 626, we are of opinion that the court below could make the order which was disobeyed, and it should be upheld.

The petition should be dismissed, and the defendant remanded to the custody of the sheriff.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the petition is dismissed, and defendant remanded to the custody of the sheriff.

Ross, J., dissenting.—I think the power to allow a wife counsel fees in the appellate court in proper cases is vested in the appellate court as an incident to the proper exercise of its jurisdiction, and that it does not come within the jurisdiction of the court from which the appeal is taken to make such allowance. It is provided by section 946 of the Code of Civil Procedure: "Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; but the court below may proceed upon any other matter embraced in the action, and not affected by the order appealed from." But, as was said in respect to a similar statute by the Supreme Court of Nevada in *Lake v. Lake*, 17 Nev. 243, I do not think the grant of power to proceed "upon any other matter included in the action, and not affected by the judgment or order appealed from," authorizes the court below to do what it cannot do if no appeal is taken. See also *Stafford v. Stafford*, 53 Mich. 522; *Lake v. Lake*, 16 Nev. 369.

For these reasons, I think the petitioner illegally restrained, and that he should be discharged.

Rehearing denied.

[No. 11488. Department One.—July 30, 1886.]

THOMAS P. WINTER, PETITIONER, *v.* THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, RESPONDENT.

ACTION FOR SUPPORT AND MAINTENANCE — ORDER FOR COUNSEL FEES — STAY OF TRIAL — DISCRETION. — In an action by a wife against her husband for permanent support and maintenance, the court has discretion to refuse to proceed with the trial at the request of the defendant until he has complied with an order made *pendente lite* directing him to pay counsel fees to the plaintiff, or until the order has been reversed or annulled on appeal.

APPLICATION for a writ of mandate. The facts are stated in the opinion.

George D. Collins, and Eugene N. Deuprey, for Petitioner.

Tyler & Tyler, for Respondent.

FOOTE, C.—The wife of Thomas P. Winter instituted against him an action for permanent support and maintenance. *Pendente lite*, the judge of the Superior Court to whom the cause had been assigned for trial made an order directing the payment to the wife of a sum of money as counsel fees. From that order the defendant took an appeal to this court, and pending that, applied to the court below to proceed with the cause on the day upon which it had been set for trial, said day having been specified before the order to pay counsel fees was made. This, it is alleged by him, the court refused to do, and he applied for and obtained a writ of mandate from this court for such judge to show cause why he had not proceeded to the trial of the action of *Annie Winter v. Thomas P. Winter*.

From the answer of the trial judge, it appears "that he refused to compel the plaintiff to try said cause" until the order for the payment of counsel fees had been com-

plied with, or until this court had reversed or annulled that order.

It does not appear to be disputed in any quarter that the plaintiff is the wife of Thomas P. Winter.

Under such circumstances, we cannot say that the learned judge abused the discretion vested in him as to when causes before him should be set for trial.

We are of opinion that the petition should be dismissed and the writ denied.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the petition is dismissed and writ denied.

[No. 8879. In Bank.—July 30, 1886.]

GEORGE W. FRINK, APPELLANT, v. RICHARD ROE
ET AL., RESPONDENTS.

EXECUTION — DESIGNATION OF PROPERTY TO BE LEVIED ON — WAIVER OF RIGHT BY DEBTOR — REGULARITY OF LEVY. — Under section 189 of the practice act of 1850, an execution debtor had the right of designating the property to be levied upon, but he could not defeat a levy by neglecting or refusing to exercise the right; and in the absence of a showing that such right was exercised by the debtor and disregarded by the officer, the former cannot be heard to complain, nor can a stranger to the writ, having no interest in or lien upon the property seized, question the regularity of the levy for such cause.

ID. — NOTICE OF SALE — INFORMALITY IN. — A failure to give the proper notice of a sale of real estate under an execution does not invalidate the sale.

ID. — SALE UNDER EXECUTION — WHAT ESTATE PASSES BY. — On a sale of real property under execution, the interest or estate of the judgment debtor in the property at the date of the sale passes to the purchaser, although acquired after the levy of the execution.

EJECTMENT — COMMON SOURCE OF TITLE — EVIDENCE OF PRIOR TITLE. — In an action of ejectment, where both parties claim to deraign title from the same source, the plaintiff need not introduce in evidence any conveyance from the former owner to the person having the common source of title.

POWER OF ATTORNEY — EVIDENCE TO INTERPRET OR ENLARGE POWERS. — Parol evidence is admissible to interpret the powers conferred

by a power of attorney, but not for the purpose of enlarging them or conferring others not enumerated.

ID. — POWER TO SELL — AGENT CANNOT SELL IN PAYMENT OF HIS OWN DEBTS — NOTICE BY PURCHASER. — An agent authorized to sell and convey the property of his principal cannot, as against the principal, convey it in trust for the payment of his own debts to one who has notice of the terms of the agency.

FRAUDULENT CONVEYANCE — VALIDITY OF INTER SE. — A conveyance for the purpose of defrauding the creditors of the grantor is valid and binding as between the parties, and as to all other persons except creditors of the grantor.

ID. — FRAUD ON SUBSEQUENT PURCHASERS — CONVEYANCE CANNOT BE QUESTIONED IN EJECTMENT. — Under the statute of frauds of 1850, a sale with the intent to defraud subsequent purchasers is fraudulent as against such purchasers for a valuable consideration and without notice, and as against such purchasers with notice if the grantee in the fraudulent conveyance was privy to the fraud. But the validity of the conveyance cannot be questioned in an action of ejectment if the pleadings contain no proper allegations of the fraud.

POWER OF ATTORNEY — REVOCATION — INTEREST OF AGENT — CONSIDERATION. — A power of attorney, although expressly stipulated to be irrevocable, may be revoked at the will of the principal, if the agent has no interest in its execution, and there is no valid consideration therefor.

ID. — POWER WHEN IRREVOCABLE. — Where a power of attorney is given for a valuable consideration, or is coupled with an interest, or is part of a security for the payment of money or the performance of some other lawful act, it is irrevocable, whether so expressed upon its face or not.

ID. — DEATH OF PRINCIPAL. — The death of the principal revokes a power of attorney, except where the power is coupled with an interest in the thing actually vested in the agent.

ID. — POWER COUPLED WITH INTEREST DEFINED. — To constitute a power coupled with an interest, the interest must be in the subject-matter over or concerning which the power is to be exercised; an interest in that which is to be produced by the exercise of the power is not sufficient.

ID. — POWER TO SELL REALTY — INTEREST OF AGENT IN SUBJECT-MATTER. — An agent to sell real property has not a power coupled with an interest unless the instrument containing the power gives him such an interest or estate in the land as will entitle him to execute the power in his own name.

ID. — FRAUDULENT CONVEYANCE BY AGENT — WHEN NOT VOID. — Where a sale of real estate is made by an agent under a power authorizing him to sell and convey, and it appears upon the face of the deed when compared with the power that he has complied with the requirements of the latter, the legal title will pass to the grantee, and remain in him and those holding under him until set aside by a court of equity, notwithstanding the agent may have violated his duty to the principal by fraudulent practices which do not appear in the deed.

ID. — CONVEYANCE IN EXCESS OF AUTHORITY — WHEN VOID. — If, on the contrary, the agent acts without and in excess of the authority conferred upon him, and his want of authority is ap-

parent upon the face of the record, his attempted action is void, and a conveyance under such circumstances is not simply voidable, but absolutely void, and advantage may be taken of it in whatever court or proceeding it may be proffered as a basis of title.

ID. — RECORDING POWER OF ATTORNEY — NOTICE TO SUBSEQUENT PURCHASERS. — A power of attorney to sell and convey real estate, if duly recorded, is notice to subsequent purchasers dealing with the agent, in relation to the property, of the terms of the agency.

ID. — EVIDENCE TO SHOW INTEREST OF AGENT. — The action was brought to recover the possession of certain land originally owned by one Rising, who conveyed it by an absolute deed to one Hodgdon. At the time of the conveyance, Hodgdon executed to Rising a power of attorney authorizing him to sell and convey the land. The plaintiff claims title under a deed executed by Rising, as the attorney in fact of Hodgdon, after the death of the latter. *Held*, that parol evidence was inadmissible to show that the power given to the attorney was coupled with an interest in the land, or that he retained an interest therein after the execution of his deed to Hodgdon.

TAX DEED — RECITAL — SALE — INVALIDITY OF DEED. — A tax deed which recites that the tax collector offered the land on which the tax was levied for sale as one parcel, instead of offering it to the person who would take the least quantity and pay the tax, is void.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The tax deed referred to in the opinion was offered in evidence by the plaintiff, and excluded. It recited that the tax collector offered the land at public auction as one parcel, instead of offering the smallest quantity which any purchaser would be willing to take and pay the tax. The further facts are stated in the opinion.

E. A. & G. E. Lawrence, Taylor & Haight, and Mich. Mullany, for Appellant.

The power of attorney was irrevocable at death, because coupled with an interest and being for a valuable consideration. (*Barr v. Schroeder*, 32 Cal. 617; *Travers v. Crane*, 15 Cal. 12; *Blackstone v. Buttermore*, 53 Pa. St. 268; *Coffin v. Landis*, 46 Pa. St. 484; Story on Agency, sec. 476; *McGregor v. Gardner*, 14 Iowa, 326.) The deed from Rising to Hodgdon was a voluntary conveyance in

fraud of subsequent purchasers. Such deeds are void at common law without the aid of the statute of frauds. (*Kerr on Fraud and Mistake*, 228; *Bump on Fraudulent Conveyance*, 268; *Kimball v. Hutchins*, 3 Conn. 450; *Vance v. Boynton*, 8 Cal. 560.) The deed of Rising in trust for the payment of his debts was voidable, but not void. (*Marsh v. Whitmore*, 21 Wall. 178; *Bassett v. Brown*, 105 Mass. 551; *Greenwood v. Spring*, 54 Barb. 875; *Uhlich v. Muhlke*, 61 Ill. 499; *Leach v. Fowler*, 22 Ark. 143; *Estes v. Boothe*, 20 Ark. 583; *Wadsworth v. Gay*, 118 Mass. 44; *Adams Min. Co. v. Senter*, 26 Mich. 73; *Gaines v. Acre, Minor*, 142; Pomeroy's *Equity*, secs. 957-959.)

McAllister & Bergin, and *T. B. Bishop*, for Respondents.

The deed of Rising after the death of Hodgdon was void. (*Travers v. Crane*, 15 Cal. 16; *Barr v. Schroeder*, 32 Cal. 617.) The deed of Rising in trust for the payment of his debts was void. (*Dupont v. Wertheman*, 10 Cal. 367; *Mott v. Smith*, 16 Cal. 557; *Meade v. Brothers*, 28 Wis. 693; *Bostick v. Hardie*, 30 Ga. 836.) The invalidity was patent upon the record, and all parties dealing with the property took with notice. (*Hassey v. Wilkie*, 55 Cal. 525; *Brush v. Weare*, 15 Pet. 111; *Wilson v. Castro*, 31 Cal. 435.) The power of attorney was not coupled with an interest. (*Hunt v. Rousmanier*, 8 Wheat. 174; *Bonney v. Smith*, 17 Ill. 531; *Barr v. Schroeder*, 32 Cal. 617; *Tharp v. Breuneman*, 41 Iowa, 254; *Reed v. Welsh*, 11 Bush, 450.) The use of the word "irrevocable" in a power of attorney, when not coupled with an interest, confers no greater authority upon the agent than an ordinary power of attorney. (*Walker v. Denison*, 86 Ill. 144; *McGregor v. Gardner*, 14 Iowa, 340; *Blackstone v. Buttermore*, 53 Pa. St. 267.)

SEARLS, C.—This is an action of ejectment to recover a portion of South Beach block, No. 25, of the city and county of San Francisco.

Defendants had judgment, from which and from an order denying a new trial plaintiff appeals.

The appeal was heard by Department Two of this court, and a judgment of reversal rendered June 29, 1885. Upon petition, a hearing in bank was ordered, and after oral argument and filing of additional briefs, the cause is again presented for decision.

At the trial, the plaintiff, for the purpose of proving title in himself, introduced in evidence the judgment roll, etc., in case of *Peter Smith v. City of San Francisco*, from which it appears judgment in favor of plaintiff was entered March 4, 1851.

Plaintiff also offered in evidence a sheriff's deed from the city of San Francisco, by J. C. Hayes, sheriff, to John McHenry, dated June 17, 1851, and recorded June 21, 1851, which deed was executed pursuant to a sale of the demanded property made June 14, 1851, under an execution issued upon said Peter Smith judgment March 10, 1851, and levied on said property.

It appears that after notice of sale under the execution, an injunction issued whereby the proceedings were stayed until May 10, 1851, when a *venditioni exponas* issued, under which the sale was made on the date above mentioned.

Plaintiff deraigns title under the sheriff's deed through sundry mesne conveyances.

In the former opinion, it was said, "the sale under the execution issued on the judgment in *Smith v. City of San Francisco* was regular, and passed all the title which the city had on the day of sale."

"The sheriff's deed passed such title to the purchaser, and such title came regularly by proper conveyances to and vested in D. B. Rising, under whom both of the parties to this action claim."

Counsel for respondents challenge this conclusion, and contend that no title passed under the sheriff's deed to McHenry, and in support of their contention call attention to the facts,—

1. That the premises in question constitute a part of what is known as the beach-and-water-lot property, the title to which vested in the city under the act of March 26, 1851. (Stats. 1851, p. 327.)
2. That under the law in force in 1851, a judgment created no lien on real estate unless a transcript of it were filed in the office of the recorder of deeds. (Stats. 1851, p. 443, sec. 172.)
3. That under section 184 of the practice act of 1850, "the following property shall be liable to be seized and sold on execution. . . . All the real estate not exempt by law whereof the defendant, or any person for his use, was seized on the day of the rendition of the judgment, or at any time thereafter."

That under section 189, "the person against whom an execution for money is issued shall have the right to designate the property to be levied upon," and that twenty days' notice, either printed or in writing, was required to be posted prior to sale.

From the facts hereinbefore stated, it will appear that title to the demanded premises vested in the city subsequent to the issue and levy of the execution, and subsequent to the notice of sale, but before the sale took place.

The right of a defendant in an execution to designate the property to be levied upon is personal to himself, and may be waived. An officer may not deny the right if claimed. (*Ashby v. Dillon*, 19 Mo. 619; *State v. Willis*, 33 Ind. 118.)

If the debtor is absent, the officer need not hunt him up, or wait for his return. (*Cook v. Garza*, 13 Tex. 431; *People v. Palmer*, 46 Ill. 398.)

Clearly, the defendant in an execution under a statute giving him the right of designating the property to be levied upon cannot defeat a levy by neglect or refusal to exercise his statutory right, and in the absence of a showing that such right was exercised by defendant, and dis-

regarded by the officer, the former cannot be heard to complain, nor can a stranger to the writ, having no interest in or lien upon the property seized, be permitted to question the regularity of the levy for such cause.

A failure to give the proper notice of a sale of real estate under execution does not invalidate the sale; and in *Smith v. Randall*, 6 Cal. 47, it was held not to afford sufficient cause for setting it aside. (*Harvey v. Fisk*, 9 Cal. 94; *Cloud v. El Dorado County*, 12 Cal. 133; *Shores v. Scott River W. Co.*, 17 Cal. 628; *Sismon v. Eckstein*, 22 Cal. 590; *Blood v. Light*, 38 Cal. 649.) These preliminary questions disposed of, it only remains to inquire whether the title acquired by the city subsequent to the levy of the execution, and before the sale passed to the purchaser.

The purchaser at an execution sale acquires the real interest of the defendant and nothing more. It is not like a sale in market overt, in which the apparent interest of the seller passes to the purchaser, but as a rule (to which there are few exceptions) the latter takes the precise interest of the defendant. An after-acquired title by the judgment debtor does not pass to the purchaser.

The sheriff, as the enforced agent of the defendant, can give no warranty or covenant to bind or affect any after-acquired title.

The judgment and execution constitute the charter, the warrant of authority to the officer. They are evidence of his authority, and taken together indicate his duty, nothing more.

The sale itself is measured by the deed, and the authority to make it being in the officer, the purchaser may, as was said in *Blood v. Light*, 38 Cal. 640, rely upon the legal presumption that the acts of the officer preceding the sale have been duly performed; "that the officer has found no personal property; that he has seized upon the land which he is about to sell, and that he has advertised the sale as required by law." (*Cloud v. El Dorado County*, 12 Cal. 133; *Clark v. Lockwood*, 21 Cal. 224.)

The statute is directory so far as it deals with the manner in which the writ is to be executed. (*Smith v. Randall*, 6 Cal. 47; *Webber v. Cox*, 6 T. B. Mon. 110; *Hayden v. Dunlap*, 3 Bibb, 216.)

If the officer fails to comply with these merely directory provisions, it is sufficient cause to set aside the sale on application of the parties, but such failure does not render the sale void. (*San Francisco v. Riley*, 21 Cal. 59.) In the case at bar, so far as appears from the record, the judgment was not filed with the recorder, as at that time required by statute, and therefore was not a lien upon the real estate of the defendant.

The lien originated in the proceedings under the execution. Freeman, in his work on Executions, sec. 282, says: "The only effect of the levy of an execution upon real estate is to make the actual interest of the defendant therein liable to be taken and sold to satisfy the writ, and to make the title deraigned through such sale paramount to all conveyances and encumbrances made subsequent to the levy."

Is it the interest at the time of levy, or at the date of the sale, which is sold?

Freeman on Executions, sec. 335, in speaking of the title which passes under judgment and execution liens, adds "that the sale made under such a lien can ordinarily transfer no interest beyond that in fact held by the defendant when the lien attached, or acquired by him subsequently thereto, and before the sale"; and we are referred to a number of authorities in support of the proposition.

We have examined these authorities, but do not find them in point beyond establishing the general proposition that the purchaser in the case we are considering takes only the interest of the judgment debtor.

The question has, however, been considered in our own court.

In *Kenyon v. Quinn*, 41 Cal. 325, the defendant in an

execution has pre-empted certain land, subsequent to which the execution was levied upon it. The debtor paid for the land, and received a certificate of purchase from the government, after the levy, and before sale under the execution. A patent afterward issued, and this court held that, "assuming that the pre-emption claim of Bremens Kenyon was subject to seizure and sale under the defendant's execution (a point not now necessary to decide), all that the sheriff could have done, and all that he attempted to do, was to seize and sell such right, title, and interest as Kenyon had in the premises at the time of the levy, and such as he acquired between the time of the levy and the sale. At the date of the levy, Kenyon had no title to the land, either legal or equitable, not then having paid the purchase-money, or obtained a certificate of purchase. (*Hutton v. Frisbie*, 37 Cal. 475.) But after the levy, and before the sale, he paid the purchase-money and obtained a certificate of purchase, which vested in him an equitable title, and which entitled him to a conveyance of the legal title by a patent from the government. . . . The defendant by his purchase and the sheriff's deed had simply succeeded to the equitable title of Kenyon; and when the latter afterward obtained the legal title by means of the patent, he held it in trust for the defendant (purchaser under execution), and could have been compelled to convey it upon a proper application to a court of equity for that purpose."

It is the sale and deed thereunder which passes the title of the execution debtor. The judgment, execution, and levy by the officer constitute the authority and fix the origin of the lien, and under the law define the property, to which such lien attaches, but they do not, any or all of them, measure the interest to which it attaches; or rather it attaches to any interest which the judgment debtor may have in the property, from the time such lien has its inception until a sale or termination thereof.

In this case, the lien only commenced with the levy of the execution. The *verditioni exponas* did not enlarge or modify it, but simply compelled the sheriff to sell, as though the original writ had remained in force. (Freeman on Executions, sec. 58.)

The legal effect of a sheriff's deed properly executed after a valid sale of property under execution (independent of the doctrine of relation under which a lien may have been perpetuated) is at least equal to that of a quit-claim deed of the same property executed by the debtor on the day of sale.

In *Emerson v. Sansome*, 41 Cal. 552, it was said that a sheriff's deed transfers to the purchaser all the interest the execution debtor had in the land sold at the date of the levy, but no subsequently acquired rights; but upon examination of this and some other analogous cases, it will be found the subsequently acquired rights have in every instance accrued after the sale; and in the only authorities we have been able to find where title vested before the sale, it is held to have passed by the sheriff's deed thereunder.

We therefore hold that upon a sale under execution the interest or estate of the judgment debtor in and to the property at the date of the sale passes to the purchaser, although acquired after the levy of the execution.

It follows that we may repeat, in the language of the former opinion in this case: "The sale under the execution issued on the judgment in *Smith v. City of San Francisco* was regular, and passed all the title which the city had on the day of sale."

We may add that this sale, or others depending on like facts, were upheld in *Smith v. Morse*, 2 Cal. 524, and in *Welch v. Sullivan*, 8 Cal. 165.

Again: both parties to the action deraign title to the demanded premises through Rising; and we understand the principle to be settled; that if in an action of ejectment both parties claim to derive title from the same

source, it is not necessary for the plaintiff to introduce in evidence a conveyance from the former owner to the person having the source of title. (*Spect v. Gregg*, 51 Cal. 198; 2 Greenl. Ev., sec. 307, and note.)

2. The title acquired by John McHenry under sheriff's deed passed by proper conveyances to, and on the 30th of March, 1853, was vested in, D. B. Rising, who, on the day last mentioned, executed a quitclaim deed of the premises to James H. Hodgdon for a consideration, as recited in the deed, of seven thousand nine hundred dollars.

On the same day, Hodgdon executed to Rising a power of attorney, by which, in consideration of five dollars, he constituted the latter his attorney in fact, "without any revocation or power of revocation" on the part of Hodgdon, the constituent, authorizing the attorney so constituted to bargain, sell, and convey the land conveyed by deed to Hodgdon just above mentioned, as well as certain other lands then recently conveyed to him, some of them by Rising, and some by Rising and one Raphael Schoyer.

The deed to Hodgdon was recorded March 30, 1853, and the power of attorney also on the 10th of October, 1853.

Rising, in his own name, and as attorney in fact of Hodgdon, on the tenth day of October, 1853, conveyed the demanded premises to David S. Turner and Samuel Hort in trust for the benefit of the creditors of the firm of Rising, Casselli and Company, of which firm Rising was a member, and under this deed of trust, and from the trustees mentioned as grantees, plaintiff deraigns title.

Hodgdon left the state of California soon after the execution of the power of attorney, and departed this life in 1862. Defendants deraign title through his devisee.

After the death of Hodgdon, and in 1866, Rising, as attorney in fact of the former, conveyed by quitclaim deed to Rufus Wade, under whom plaintiff claims by deed executed in 1867.

Upon the facts two main questions arise in reference to the validity of plaintiff's title.

1. As to the right of Rising under the power of attorney from Hodgdon to convey the property in trust for the payment of the debts of the firm of Rising, Casselli & Co.

2. As to the authority of Rising under the same power to convey the property to Wade in 1866, after the death of Hodgdon.

The contract which exists between the principal and agent is called a contract of agency; the right of the agent to act in the name or on behalf of another is termed his authority or power, and this, if conferred by a formal instrument in writing, is said to be conferred by letter of attorney or power of attorney.

It is with an instrument of this character that we have to deal. It was an instrument authorizing the conveyance of land, and was therefore necessarily in writing. In such cases, "the nature and extent of the authority must be ascertained from the instrument itself, and cannot be enlarged by parol evidence of the usage of other agents in like cases, or of the intention to confer additional powers; for that would be to contradict or to vary the terms of the written instrument." (Story on Agency, sec. 76; *Hogg v. Snaith*, 1 Taunt. 347.)

It must not be understood that the usages of business or of agents of particular classes cannot be introduced in evidence for the purpose of interpreting the powers actually given, or the modes of their execution.

In other words, parol evidence may be received to interpret the powers conferred, but not for the purpose of enlarging them or conferring others not enumerated.

Interpreting this instrument from what appears on its face, we find it was executed in consideration of five dollars paid, and was irrevocable by the principal.

It cannot be contended that an agent authorized to sell and convey the property of his principal can, as

against such principal, convey it in trust for the payment of his own debts to one who has notice; and as in this instance the power was (as it was bound to be to authorize the conveyance) in writing and was of record, thus imparting notice to the purchasers and all concerned, the conveyance by Rising in trust for the payment of the debts of his firm cannot, as against Hodgdon, be upheld, unless the authority was so coupled with an interest in the property as to validate the conveyance made for the benefit of the agent.

It is claimed that the conveyance from Rising to Hodgdon, and the power of attorney back, were one and the same transaction, and were but parts of a scheme to defraud the creditors of Rising, who was in failing circumstances, and that the pretended conveyance was fraudulent and void, and as a sequence, no title ever passed from Rising to Hodgdon.

The circumstances would seem to lend plausibility to this theory of the object of the conveyance, but assuming it as true, we do not see how the result claimed ensues.

A conveyance for the purpose of defrauding creditors is valid and binding as between the parties, and as to all other persons except creditors of the grantor; and they are not here complaining.

So, too, a sale with the intent to defraud subsequent purchasers was, under the statute of frauds of 1850 (Stats. 1850, p. 266), fraudulent as against such purchasers for a valuable consideration and without notice, and as against such purchasers with notice if the grantee in the fraudulent conveyance was privy to the fraud.

A court of equity would in such cases, by direct proceedings instituted for such purpose, set aside and annul a fraudulent conveyance of this character.

A court of law, also, in a proper case, upon pleadings setting out the facts constituting the fraud, might remedy the wrong.

But in an action of ejectment, counting upon the legal

title, with no proper allegations to that end, such an inquiry is not permissible.

It is further contended that the power was executed for a valuable consideration, was by its very terms irrevocable, and was coupled with an interest, and that therefore the attorney could sell and convey at will to such persons, upon such terms, and for such consideration, as he saw fit.

1. The general rule is, that the principal may revoke the authority of his agent at his mere pleasure. (Story on Agency, sec. 462.)

2. Although the principal has expressly stipulated that the power shall be irrevocable, still, if the agent has no interest in its execution, and there is no valid consideration for the execution of such power, it is a "mere *nude pact*, and is deemed in law to be revocable at the will of the constituent, upon the principle that he who alone has an interest in the execution of an act is also entitled to control it." (Story on Agency, sec. 476.)

3. Where an authority or power is given for a valuable consideration, or is coupled with an interest, or is part of a security for the payment of money or the performance of some other lawful act, it is irrevocable, whether so expressed upon its face or not.

4. The death of the principal revokes a power to the agent by operation of law, except where coupled with an interest in the thing actually vested in the agent. (Story on Agency, sec. 489.)

5. In reference to what is meant by the term "a power or authority coupled with an interest," some confusion has been created by loose expressions to be found in cases either not well considered, or in which the point is not essential to a decision.

The question was elaborately considered and definitely settled by Chief Justice Marshall in *Hunt v. Rousmanier*, 8 Wheat. 174, in an opinion which seems to us to leave little room for later discussion.

The doctrine of that case is, that the term "a power coupled with an interest" means an interest in the subject-matter over or concerning which the power is to be exercised; that the interest must be in the thing itself.

"In other words, the power must be ingrafted on an estate in the thing."

It is not sufficient that the "interest" is in that which is to be produced by the exercise of the power, for in that case, as is well said by Chief Justice Marshall, they are never united.

"The power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be coupled with it."

The doctrine of *Hunt v. Rousmanier, supra*, and of other cases on the question, as we understand them, require, in cases relating to real estate, that such an interest or estate shall pass to the agent as will entitle him to execute the power in his own name.

Unless thus vested with an estate in the subject-matter over which the power is to be exercised, it is not perceived how an agent could convey the estate of a dead man.

That which a man cannot do himself cannot be done by an agent in his name. (*Story on Agency*, sec. 488; *Barr v. Schroeder*, 32 Cal. 609.)

Testamentary powers, to be executed after the death of the testator, depend upon a different principle, and need not be considered here.

We conclude that, as no estate or title vested in Rising by virtue of the power conferred upon him, or so far as appears by the testimony, conceding it to have been admissible, it must follow:—

1. That his authority terminated with the death of Hodgdon, his principal, in 1862, and as a consequence, that the deed to Wade executed thereafter was absolutely void.

2. That as against his principal, Hodgdon, he had no right to execute a deed of trust to trustees for the payment of the debts of Rising, Casselli & Co.

Our next inquiry must be directed to the question of whether the trust deed executed by Rising to pay the debts of his firm was absolutely *void* and of no effect, or whether it conveyed title, and can stand until the subject of a direct attack to set it aside.

If the latter, we need not in this action at law, in which no equitable rights are set up, pursue the subject further.

It is said the acts of an agent in excess of his authority may be ratified by the principal; that where the principal, with a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings, or omissions of his agent, he thereby makes them his own, and will be bound as fully, to all intents and purposes, as if he had originally given him direct authority in the premises to the extent to which such acts, doings, or omissions reach. (Story on Agency, sec. 239 et seq.)

The same author states that at common law there is a distinction between the ratification of acts which are *void* and the ratification of acts which are *voidable*. In the former case, the ratification is inoperative and void for any purpose; in the latter, full validity is given to the acts until a judicial determination of their character.

He seems to think, however, that this distinction is more properly applicable to cases of contracts and acts which are illegal or immoral or against public policy; cases in which the acts being void ought not to be allowed to acquire any validity since the same objections exist to the ratification as to the original transaction, and that in ordinary cases of agency, the acts of the agent without or in excess of authority may be validated by ratification. (*Taylor v. Robinson*, 14 Cal. 396; *Davidson v. Dallas*, 8 Cal. 227; *Dupont v. Wertheman*, 10 Cal. 354; *Ellison v. Jackson W. Co.*, 12 Cal. 542; *McCraken v. San*

Francisco, 16 Cal. 591; *Grogan v. San Francisco*, 18 Cal. 590; *Blen v. B. R. & A. Co.*, 20 Cal. 602; *Racouillat v. San-sevain*, 32 Cal. 376.)

This doctrine is referred to not because the record shows a ratification of the acts of the agent, but because it is frequently presented as illustrating the doctrine applicable to void and voidable transactions.

In *Benham v. Rowe*, 2 Cal. 387, it was held that where a sale was irregularly made under a power contained in a mortgage, and the bill filed by the mortgagor did not ask to have it set aside, such sale must stand.

Wharton in his work on Agency holds that "whenever an agent attempts to use his fiduciary powers for his own benefit, he will be liable to be arrested in the attempt by a court of equity." (Sec. 231.) In "all those instances in which one party purporting to act in his fiduciary character deals with himself in his private and personal character without the knowledge of his beneficiary, as where a trustee, or agent to sell, sells the property to himself, such transactions are voidable at the suit of the beneficiary." (Pomeroy's Eq. Jur., sec. 957.)

The conclusion we reach from a review of the cases bearing on the subject is, that where a sale is made by an agent under a power authorizing him to sell and convey, and it appears upon the face of his deed when compared with the power that he has complied with the requirements of the latter, the legal title will pass to the grantee, and remain in him and those holding under him until set aside by a court of equity, notwithstanding the agent may have violated his duty to the principal by fraudulent practices which do not appear in the deed.

In other words, a sale and conveyance being authorized, the *modus* and objects thereof, except so far as they appear in the record, cannot be summarily examined and disposed of by testimony *dehors* the record, in an action of ejectment without pleadings formulated for

such purpose, and with no object of setting aside the conveyance.

2. If an agent acts without and in excess of the authority conferred upon him, and such want of authority is apparent upon the face of the record, his attempted action is void, and a conveyance under such circumstances is not simply *voidable*, but absolutely *void*, and advantage may be taken of it by objection, in whatever court of proceedings it may be proffered as a basis of title.

Rising was fully authorized by the power of attorney from Hodgdon to sell and convey the demanded property to such persons and for such purposes and at such price as he saw fit, subject only to the law. He could not make a deed of gift of the property, or convey it to himself, or, what was the same thing, convey it in trust to Turner and Hort for the payment of his own debts and those of his copartners. In so doing, he violated a fundamental principle governing and controlling the acts and conduct of agents, and the object being patent on the face of the deed, when taken in connection with his letter of attorney, such deed was in excess of authority and void. (*Dupont v. Wertheimer*, 10 Cal. 367; *Mott v. Smith*, 16 Cal. 537; *Meade v. Brothers*, 28 Wis. 693; *Bostwick v. Hardie*, 30 Ga. 836.)

This infirmity was, as we have stated, patent upon the record, and all parties dealing with the property took with notice of it. (*Hassey v. Wilkie*, 55 Cal. 525; *Wilson v. Castro*, 31 Cal. 435; *Brush v. Ware*, 15 Pet. 111.)

In justice to counsel in the cause, and in deference to the authors of the former opinion filed in the case, we ought to further notice the question raised upon the testimony of Clark, by which it is claimed to have been shown that the powers of Rising were enlarged so that his authority to convey the property could be upheld.

By section 1849 of the Code of Civil Procedure, it is provided that "where, however, one derives title to real property from another, the declaration, act, or omission

of the latter, while holding the title, in relation to the property in evidence against the former."

We do not understand that it was the intention of the legislature by this section to vary or alter the rules of evidence existing prior to its passage. By the preceding section, it had been provided that "the rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore proceedings against one cannot affect another."

In actions to set aside conveyances by which title passes, upon the ground of fraud, where the question is not as to the fact of conveyance, but the *animus* with which it was made, the declarations of parties are of course admissible to establish fraud.

So a deed absolute on its face may be shown by parol to have been intended as a mortgage; and other cases might be cited in which courts of equity look to the intent of the parties rather than to the form of their proceedings for the purposes of justice.

Here, however, the question is: Was parol testimony admissible to enlarge the power given and defined in a properly executed power of attorney, or to show that notwithstanding an absolute deed was made to Hodgdon, yet that Rising, his grantor, retained some interest in the property? Can this be shown in an action of ejectment,—an action at law in which no equitable relief is sought, and founded upon such pleadings as are usually met with in this class of cases?

In such an action, can it be shown that A, who presents a patent from the government to land, has declared such patent to mean something different from what is expressed in it, and thus defeat the title conveyed thereby? or that a power of attorney to A authorizing him to lease or repair was intended to empower, and therefore did empower him to sell and convey an indefeasible title?

To our minds, the negative of these propositions is too apparent to need argument.

If we admit that the testimony of Clark was admissible under section 1849 of the Code of Civil Procedure, it does not follow that the facts to which he testified could defeat the operation of the deed from Rising to Hodgdon, or enlarge the powers of the former under his letter of attorney from the latter.

These effects cannot be accomplished by parol.

Were the rule otherwise, the tenure by which for wise purposes real estate is held and made to pass would depend, not upon the solemn acts of the parties, evidenced by formal writings, carefully designed to express their precise meaning, and intended to be as enduring as the earth to which they relate, but upon the uncertain memory of living witnesses, who detail second-handed the declarations of the actors.

Under such a rule, a power of attorney might be upheld by parol testimony in one generation, and in the next the legal structure reared upon and supported by it must fall for the want of the testimony in its support.

Section 1849 of the Code of Civil Procedure simply provides that the declarations, acts, or omissions of the former owner while holding the title in relation to the property are evidence.

This should not be construed to enlarge the class of cases in which before the code, the declarations, acts, or omissions of the holder of the legal title were admissible at common law against himself, but rather to permit the declarations, acts, and omissions of the grantor to be introduced precisely as though he had retained the title and was a party to the action.

The scope of the testimony is not enlarged by the code.

Any declarations, acts, or omissions of the grantor while holding the title in relation to the property, and which could have been introduced against him while an

owner, may be introduced against his grantee,— nothing more.

It does not measure or prescribe the effect to be given to such testimony when introduced, or render it efficacious to prove any fact which could not before be established by like testimony.

"Declarations of persons in possession of land explanatory of the character of their possession are admissible in evidence. . . . Possession is *prima facie* evidence of seisin in fee-simple; and the declarations of the possessor that he is tenant to another, it is said make most strongly *against his own interest, and therefore are admissible*. But no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the claimant's title or otherwise, qualifying his possession, if made in good faith, should not be received as part of the *res gestae*, leaving its effect to be governed by other rules of evidence. (1 Greenl. Ev., sec. 109.)

Declarations by a person in possession in disparagement of his title are to be received, "leaving its effect to be governed by other rules of evidence."

One of these rules was, that real estate could not be conveyed by parol.

Another was, that an authorization or power to convey real estate could only be conferred by a written instrument.

A third was, that there could be no evidence of the contents of a writing except the writing itself, save in certain excepted cases, of which this is not one.

A fourth rule was, that parol testimony could not be received to curtail, enlarge, alter, or modify the effect of a written instrument. (*Conner v. Clark*, 12 Cal. 168; *Ruiz v. Norton*, 4 Cal. 355; S. C., 60 Am. Dec. 618; *Donahue v. McNulty*, 24 Cal. 411; *Osborn v. Hendrickson*, 7 Cal. 282; *Ward v. McNaughton*, 43 Cal. 159.)

The exceptions to this last rule, in case of ambiguity, mistake, etc., do not alter but rather demonstrate the rule.

Clark's testimony does not go to show that the deed from Rising to Hodgdon was a mortgage. But it is claimed that it shows that the deed from Rising to Hodgdon, and the power of attorney from Hodgdon to Rising, taken together, meant that though the property was conveyed, by Rising to Hodgdon, yet it really was not conveyed, and that Rising still continued to own it.

Could Rising thus by parol defeat his own deed? Could he say, I conveyed to Hodgdon, but the parol agreement was that the title should not pass. Could Rising so contradict his own deed and revest the property in himself by parol? If Mr. Rising could not do it, can Clark do it by repeating what Rising told him? Can the statute of frauds be wiped out, which says "no estate or interest in real property other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing." (Code Civ. Proc., sec. 1971.)

The foregoing section, though adopted since the transactions of which we speak, is but a transcript of the former law on the subject.

Certainly, one party to a written contract cannot at the time of its execution, or thereafter, destroy such written contract or deed by declaring *in the absence of the party with whom he had contracted or to whom he had conveyed* that his contract or deed was not intended to operate according to its tenor and effect.

Clark had no knowledge whether or not a consideration was paid by Hodgdon to Rising for the deed in question.

Our conclusion is, that the testimony of Clark was not competent to prove in opposition to the writings

the facts claimed for it; and admitting it to have been introduced without objection (although such does not seem to be the case), yet it cannot be given an effect which the law provides can only be obtained by virtue of written instruments. Section 1849 of the Code of Civil Procedure makes the admissions, acts, and omissions of the holder of the title while an owner, relating to the property, admissible against his grantee. But it does not make his oral declarations competent to prove that which can only be established by a writing, or give to them an effect which can only be obtained by a deed, or make them admissible under an issue to which they are foreign.

In other words, it only makes them competent to prove what under the law such declarations, acts, or omissions are competent to prove, and in cases to which the evidence is pertinent.

Sneed v. Woodward, 30 Cal. 433, *McFadden v. Wallace*, 38 Cal. 58; *Phelps v. McGloan*, 42 Cal. 303, and *McFadden v. Ellmaker*, 52 Cal. 349, were all cases in which the evidence offered was competent to prove admissible facts.

Wharton on Evidence, at section 1156, lays down the doctrine that the admissions of a predecessor in title as a rule are admissible, and are compatible with "the rule that parol evidence is not admissible to vary dispositive writing." (*Jackson v. Spearman*, 6 Johns. 22; *Jackson v. Vosburg*, 7 Johns. 186.)

In *Kimball v. Morrell*, 4 Greenl. 371, it was said:—

"When the declarations of parties are admitted in evidence as a part of the *res gestae*, it is because those declarations go to explain the true intent and meaning of the parties at the time. Now, the true intent and meaning of a deed, and the contents of that deed, are to be gathered from the deed itself. The language of the parties to it, whether used before or after or at the time of its execution, cannot be given in evidence to limit, restrain, or enlarge its meaning. The declarations,

therefore, of the parties to a deed as to its contents are no part of the *res gestæ*."

In *Badger v. Story*, 16 N. H., 2d series, vol. 4, p. 171, it is said: "The grantor's declarations might also be given in evidence for other purposes. They could not be offered as part of the *res gestæ* to limit the terms of the deed itself as between the parties to it, and to show that it was to be something different from what it purported to be on the face of it."

In *Jackson v. Cary*, 16 Johns. 305, 306, it is said: "The evidence of declarations made by the defendant avail nothing, for although parol declarations of tenancy have been received with certain qualifications, parol proof has never yet been admitted to destroy or take away a title. To allow parol evidence to have effect would be introducing new and most dangerous species of evidence. The statute to prevent frauds and perjuries, which has been considered the *magna charta* of real property, avoids all estates created by parol, and all declarations of trust, excepting resulting trusts, regarding any lands, tenements, or hereditaments. Yet, in defiance of this statute, we are asked to divest the defendant of what appears to be a complete title to the premises by her parol declarations. This cannot be listened to."

M'Crea v. Purmort, 16 Wend. 473, is to the same effect.

In *Rhine v. Ellen*, 36 Cal. 371, it is held that the operative words of conveyance and the covenants in a deed cannot be contradicted by parol testimony.

In *Judson v. Malloy*, 40 Cal. 307, it was held that testimony which contradicted or tended to limit the operation of the deeds in evidence, one of which was executed to and another by the witness, should have been excluded if objected to.

These are but samples of a larger number of cases to which we have been referred, establishing the same doctrine, and from the result of which we conclude the court below did not err in excluding the declarations of Hodg-

don to Clark or to other parties, or of Rising to Nichols or others in April, 1853, or at any other time, as each and all of said declarations seem to have been offered for the purpose of giving to the deed and power of attorney an effect not competent to be proven by parol testimony.

The tax deed offered in evidence, executed by E. H. Washburn, tax collector, was properly excluded. (*Roberts v. Chan Tin Pen*, 23 Cal. 260; *French v. Edwards*, 13 Wall. 515; *Hewell v. Lane*, 53 Cal. 213.)

Upon the whole case as presented, we are of opinion the judgment and order appealed from should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

THORNTON, J., concurred in the judgment.

Rehearing denied.

[No. 8762. In Bank.—July 30, 1886.]

MILO HOADLEY, APPELLANT, *v.* CITY AND COUNTY OF SAN FRANCISCO, RESPONDENT.

SAN FRANCISCO — VAN NESS ORDINANCE — TITLE ACQUIRED BY — ADVERSE POSSESSION — PUBLIC SQUARES. — *Hoadley v. City and County of San Francisco*, 50 Cal. 265, to the effect that the plaintiff acquired no title to the public squares in controversy, either by the Van Ness ordinance or by adverse possession, affirmed.

ID. — SELECTIONS FOR PUBLIC SQUARES — RATIFICATION OF BY ACT OF MARCH 11, 1858. — The selections of land for public squares in the city of San Francisco made by the commissioners appointed under ordinances Nos. 822 and 845 of the common council, from land lying west of Larkin Street and southwest of Johnston Street, and designated as squares on the map of the commissioners approved by the board of supervisors on the 16th of October, 1856, were ratified and confirmed by the act of the legislature of March 11, 1858, and are consequently valid, although the selections em-

braced more than one block, and more than one twentieth of the land in the possession of one person, and the excess was taken without payment of compensation as provided in ordinance No. 822.

APPEAL from a judgment of the late District Court of the twelfth judicial district of the city and county of San Francisco, and from an order refusing a new trial.

The action was brought to quiet the title of the plaintiff to certain land situated in the city and county of San Francisco west of Larkin Street, and within the corporate limits of the city of San Francisco, as defined in the act of the legislature of April 15, 1851, incorporating the city, and within the four square leagues of land confirmed to the city, as the successor of the pueblo, by a decree of the United States Circuit Court of May, 18, 1865. In 1850, the plaintiff entered upon a tract of land including the premises in controversy, and from that time until the 5th of January, 1870, the date of the commencement of this action, continued in the actual, open, and exclusive possession thereof. On the 20th of June, 1855, the common council of the city of San Francisco passed an ordinance, No. 822, commonly called the Van Ness ordinance, whereby the city granted and relinquished to the actual settlers thereon all title and claim of the city to the land lying west of Larkin Street and southwest of Johnston Street, reserving streets, and also the right, within six months from the passage of the ordinance, to select therefrom engine-house lots, school-house lots, and public squares, provided the latter should not embrace more than one block, and that not more than one twentieth of the land in the possession of any person should be taken for the purpose without due compensation. No selections were made of any lots or squares by the commissioners mentioned in the ordinance, nor by the city, within six months from the date of its passage. On the 27th of September, 1855, the common council passed another ordinance, No. 845,

which ratified and confirmed ordinance No. 822, and provided for the election of commissioners to discharge the duties specified therein, and directed the commissioners and the city surveyor to furnish, within a month from the date of their appointment, a plan for the location of the streets and lots selected under the Van Ness ordinance. By an ordinance approved December 21, 1855, the commissioners were granted until March 20, 1856, to make the selections, and by a similar ordinance, approved April 7, 1856, the time was extended until April 20, 1856. On the 19th of April, 1856, the commissioners made their report to the common council, accompanied by a map, whereon were laid out six squares, each embracing four blocks, one of which squares, designated as "Alta Plaza," included a part of the land in controversy, and another, designated as "Hamilton Square," included the balance. The land included in such squares embraced more than one twentieth of the whole of the land in the possession of the plaintiff, and no compensation has ever been made or offered to him for the excess. The report and map were received by the board of assistant aldermen, and on the 21st of April, 1856, the report was read and ordered published, and laid over for further consideration. In July, 1856, the governments of the city and of the county of San Francisco were consolidated by an act of the legislature, which provided that the justices of the peace of the former county should constitute an *ad interim* board of supervisors of the city and county. On the 16th of October, 1856, the justices, acting as a board of supervisors, passed an order adopting the map reported by the commissioners, and declared it to be the map of the city of San Francisco in respect to the location and establishment of streets and avenues, and the reservation of public squares in that portion of the former city lying west of Larkin and southwest of Johnston streets. On March 11, 1858, the legislature passed an act ratifying and confirming ordinances Nos. 822 and 845, and the

order of the justices of the peace of October 16, 1856, and the map therein mentioned. Afterwards, Congress, on the 1st of July, 1864, passed an act relinquishing and granting to the city of San Francisco and its successors all the right and title of the United States to the land within the limits of the city as defined in the act of April 15, 1851, for the uses and purposes specified in the ordinances of the city ratified by the act of the legislature of March 11, 1858. The further facts are stated in the opinion of the court.

S. W. & E. B. Holladay, John Currey, and W. C. Belcher for Appellant.

The ratification by the state legislature in 1858 of the city ordinances of 1855, and the order of October 16, 1856, made the latter valid as of their respective dates. (Broom's Legal Maxims, 676; *Pickett v. Hastings*, 47 Cal. 284; *Langdeau v. Hanes*, 21 Wall. 530; *Payne v. Treadwell*, 16 Cal. 233; *Merryman v. Bourne*, 9 Wall. 600; *Seabury v. Arthur*, 28 Cal. 150; *Landes v. Brandt*, 10 How. 348; *Megerle v. Ashe*, 33 Cal. 85; *Gibson v. Hibbard*, 13 Mich. 217.) The ordinance No. 822 is a grant *in praesenti*, without exception. The privilege reserved therein of selecting public squares is strictly limited as to time and mode of selection, size of squares, and compensation for excess over one twentieth taken from any possessor. By its neglect to select in time, the city lost its right of selection. (*Merrifield v. Cobleigh*, 4 Cush. 178; *Ludlow v. N. Y. etc. Co.*, 12 Barb. 440; *Norris v. Hensley*, 27 Cal. 443; *Craig v. Wells*, 11 N. Y. 315; *Railroad Co. v. Baldwin*, 103 U. S. 426.)

John L. Love, for Respondent.

The case is identical with *People v. Holladay*, 68 Cal. 439, and should be affirmed on its authority. See also *Hoadley v. San Francisco*, 50 Cal. 265; *Sawyer v. San Francisco*, 50 Cal. 370; *Visalia v. Jacob*, 65 Cal. 484.

THORNTON, J.—This action was instituted to quiet title of plaintiff to two parcels of land situate in the city and county of San Francisco, and within that portion of said city and county to which the ordinances 822 and 845 of the common council of said city and county, and an order passed by the justices of the peace of the defendant corporation on the 16th of October, 1856, ratified by the act of the legislature of this state approved March 11, 1858, apply. One of the parcels of land in controversy forms part of Alta Plaza, and the other a part of Hamilton Square.

This cause was here before on appeal (see 50 Cal. 265), and on that appeal this court held that the plaintiff acquired no title to the lots or squares in question either by the Van Ness ordinance or by adverse possession. The questions are presented now under the same state of facts, and the above rulings of the court must be regarded as the law of the case in all its stages. In this condition of things, we see no reason why the points above mentioned should be further considered. (See *Sawyer v. San Francisco*, 50 Cal. 370; *People v. Holladay*, 68 Cal. 439; *Visalia v. Jacob*, 65 Cal. 434.)

The point made on behalf of plaintiff as to the fact that the squares in question embrace more than one twentieth of the land in possession of the plaintiff, and that the excess above such one twentieth was taken without compensation as provided in section 6 of ordinance 822, we regard as settled by this court in *Sawyer v. San Francisco*, *supra*, adversely to the contention of the plaintiff.

The reasons on which the rule just above mentioned, as to the taking of more than one twentieth, as settled in *San Francisco v. Sawyer*, *supra*, is rested, apply to the point made here that more than one block was taken to make up the squares in controversy. The survey and map of these squares so including four blocks each was approved, ratified, and confirmed by the act of the 11th of March,

1858 (Stats. 1858, p. 53), and from such approval the survey and map above mentioned acquired validity. Whatever rights the plaintiff acquired under the Van Ness ordinance, he took subject to the act of 1858, which approved the survey and map above mentioned.

This is true under any proper application of the doctrine of relation invoked on behalf of plaintiff. The act of approval ratified the ordinance 822, allowing title to be made under it by a possession designated in it, and ratified also ordinance 845 and the order of the justices approving the survey and map above mentioned; and when the act of 1858 was passed, the doctrine of relation could vest in the plaintiff no greater rights than he took under the act of 1858. Any rights which plaintiff derived under the act of 1858 would be subject to all its provisions. At the same time that ordinance 822 was ratified, the order approving the map and survey above mentioned was also ratified, and whatever rights plaintiff took under the act were subject to the provisions of the ordinance and order so ratified. We find in the case no trace of a contract between the plaintiff and any one which ever vested in plaintiff any rights different from those accorded to him herein.

The above embraces all the points in the case which are necessary to be considered. We find no error in the record, and the judgment and order must be affirmed.

Ordered accordingly.

MCKEE, J., MCKINSTRY, J., SHARPSTEIN, J., and MYRICK, J., concurred.

Rehearing denied.

[No. 11172. In Bank.—July 30, 1886.]

L. SCHLESSINGER ET AL., APPELLANTS, v. J. S. MALLARD ET AL., RESPONDENTS.

EXPRESS TRUST — TERMINATION OF — CONVEYANCE BY TRUSTOR — ESTATE OF GRANTEE. — The author of an express trust which does not provide to whom the trust property shall belong upon a failure or termination thereof may convey the property subject to the trust; and the grantee will acquire all the rights in and to the property that the trustor had.

ID. — TRUST FOR CEMETERY PURPOSES — LOS ANGELES — QUITCLAIM DEED — CONFIRMATION BY LEGISLATURE. — The land in question was originally part of the pueblo lands of the city of Los Angeles. In 1857, the city set it apart as a public cemetery, and conveyed it to the defendant and two others, since dead, in trust for the uses and purposes of a cemetery. A small portion of the land was used for such purposes until 1861, when the city resolved, by ordinance, to discontinue the use and to remove the bodies there buried. This was done, except that a few bodies buried in one corner were not removed. In 1870, the city, by a quitclaim deed, conveyed the land to the grantor of the plaintiffs, which conveyance was subsequently confirmed by an act of the legislature. *Held*, that the deed, in connection with the act of confirmation, transferred all the interest of the city in the land.

ID. — RESULTING TRUST. — *Held further*, that as to the portion of the land not used for the purposes of a cemetery, and as to which such use was discontinued, a trust resulted by operation of law in favor of the city and its grantees.

ID. — RIGHT OF TRUSTOR TO RECONVEYANCE. — The abolition of the cemetery by the city terminated the trust relation, and thereupon it became the duty of the trustees to reconvey the trust property.

ID. — TRUSTEE CANNOT HOLD ADVERSELY — STATUTE OF LIMITATIONS. — A trustee cannot be permitted to retain possession as such after repudiating the trust and claiming adversely.

ID. — SUBSTITUTION OF TRUSTEES — EQUITY. — A court of equity will substitute new trustees to manage the trust property when its safety or proper administration so requires, but will not do so if no good result is to be accomplished thereby.

ID. — GRANTEE OF TRUSTOR — CONVEYANCE TO BY TRUSTEE — DECREE. — The complaint, after setting up the trust and all the facts connected with it, alleged that the defendant had violated and repudiated it, had used the trust property for his own benefit, and that he was an unfit person to be trustee. The court found these allegations to be true, but instead of substituting a new trustee, it decreed that the defendant should convey the land to the plaintiffs, and provided that they should hold the lot in which the bodies were buried, subject to the public easement as a place of burial until the bodies were removed by proper authority. *Held*, that the decree was proper.

APPEAL from an order of the Superior Court of Los Angeles County granting a new trial.

The facts are stated in the opinion.

Glassell, Smith & Patton, for Appellants.

The effect of the trust deed was to leave the equitable fee in the city, subject to the public use and management of the trustees, until the discontinuance of the cemetery, and after that absolute. The deed to the plaintiff's grantor, though in form quitclaim, conveyed to him the beneficial title to the property. (Perry on Trusts, secs. 386 et seq.; *Easterbrook v. Tillinghast*, 5 Gray, 17; *Wilkinson v. Leland*, 2 Pet. 661; *Weissenberg v. Truman*, 58 Cal. 63; *Carpentier v. Williamson*, 25 Cal. 154; *Crane v. Salmon*, 41 Cal. 63; *Stanway v. Rubio*, 51 Cal. 41.) The object of the trust being accomplished, the plaintiffs are entitled to a conveyance from the trustee. (2 Perry on Trusts, sec. 920; Civ. Code, secs. 871, 1109; 2 Pomeroy's Eq. Jur., sec. 1043; 2 Spence's Eq. Jur. 47; *Goodson v. Ellison*, 3 Russ. 583.)

Wells, Van Dyke & Lee, and *Brunson & Wells*, for Respondents.

The quitclaim deed did not convey the title of the city. (*San Francisco v. Lawton*, 18 Cal. 465; *Morrison v. Wilson*, 30 Cal. 344; *Cadiz v. Majors*, 33 Cal. 288; *Gee v. Moore*, 14 Cal. 472.)

SEARLS, C.—This is an action to compel the defendants, as trustees, to convey to the plaintiffs certain premises situate in the city of Los Angeles, and for an accounting for the rents and profits thereof.

Plaintiffs had judgment; defendant J. S. Mallard moved for a new trial, which was granted, and this appeal was taken from the order granting such new trial.

It appears from the record that the lands in question are part of the pueblo lands of the city of Los Angeles,

and have been duly patented by the government of the United States to the authorities of said city.

In 1857, the city of Los Angeles, by its proper officers, set apart the land in question as a public cemetery, and caused the same to be conveyed to defendant J. S. Mallard and two others (now dead) in trust for the uses and purposes of a cemetery.

The property was used for cemetery purposes, and bodies were interred therein, until 1861, when the city resolved by ordinance to discontinue its use as a cemetery, and to remove the bodies buried therein to another place, which was done, except that from two to five bodies were not removed; since that date it has not been used as a place of sepulture.

On the fourteenth day of November, 1870, the city of Los Angeles, for a valuable consideration, conveyed the property by quitclaim deed to one T. A. Sanchez.

The conveyance to Sanchez was confirmed by act of legislature of the state of California (Stats. 1871-72, p. 93), and the plaintiffs herein have succeeded to the title of Sanchez.

Defendant J. S. Mallard is in possession under the deed of trust, and the other defendant holds a portion of the land under him.

In 1876 plaintiffs brought an action of ejectment against the defendant Mallard and the others to recover the property. Defendants had judgment, which on appeal was affirmed by this court (58 Cal. 63) in an opinion in which the following language was used: "We are of the opinion that the deed from the city of Los Angeles to Mallard and his associates passed the legal title, and that the trust thereby created is still in force, or was at the time this suit was tried.

"It will be time enough for the city or its subsequent grantees to assert title to the premises after the bodies now lying in the cemetery have been decorously removed to another resting-place, and the purposes of the trust have fully terminated."

This action was then brought, and after a trial, all the allegations of the complaint were found true, except as to the facts established in the former case, which are set out in full, and as to the value of the rents, issues, and profits, and judgment was rendered in favor of plaintiffs, requiring the defendants to convey the property to said plaintiffs, and decreeing that a small rectangular tract eighty by thirty feet in the southeast corner be held by the plaintiffs subject to a public easement as a place of burial of the bodies therein interred until the same shall be removed by public authority or by the friends of the deceased parties, and providing that the graves should not be disturbed, etc.

The new trial was granted by the successor of the learned judge by whom the cause was tried, and seems to be based upon the following propositions:—

1. The bodies have not been removed from the cemetery, and the legal title is yet in the defendants.
2. That the fact that the defendants claim title as trustees, and then deny the title and claim adversely, cannot affect this action.
3. Plaintiffs cannot recover the legal title from defendants unless the latter hold it, and if they hold it as *trustees*, it cannot be recovered so long as the trust remains incomPLETED.
4. Whether defendants have abused the trust or not is of no importance in this action, as it is not brought to remove the trustees, and appoint others in their place to carry out the trust, but is brought to recover the legal title from the defendants, which cannot be done at present.

These views at first glance seem formidable, if not conclusive.

If the conclusions are erroneous, it must be not from any fault in the deductions, but from assuming as premises facts not warranted by the record.

All of the allegations of the complaint are found to be true, except those hereinbefore noted.

Turning then, to the complaint, we find that among other things it is averred:—

1. That no portion of the land was ever used as a cemetery, except a rectangular piece eighty feet by thirty in the southeast corner.

2. There now remains buried on said tract about two bodies, the graves of whom are in the rectangular piece of land aforesaid.

3. Defendant Mallard has planted the greater portion of the remainder of the land to vines and fruit-trees, and since 1870 he and those under him have used the land for agricultural and other private purposes.

4. That prior to the commencement of this action, defendants repudiated the trust created by the deed of 1857.

5. The objects of the trust have been fulfilled.

All of the foregoing allegations are sustained by the testimony of defendant Mallard, except it may be the fifth, and as he states that after he went on there the graveyard was abandoned and he did not know where it was, it is not singular that the court should have found the allegation supported by the proofs.

The complaint further avers that Mallard and his grantees have violated the conditions of said trust; that said Mallard has never performed his duties as such trustee, but has used his powers and the trust property for his own private use and advantage, and that he is an unfit person to be a trustee.

Plaintiffs further offer to have the portion occupied by the graves of deceased persons conveyed to trustees, or to submit to such terms and conditions in relation thereto as to the court may seem proper.

Our code has included within its provisions many of the rules previously established by courts of equity, and in most instances has not departed from the doctrine previously upheld.

The following extracts have a bearing on the present case:—

"1. Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust." (Civ. Code, sec. 863.)

"2. Notwithstanding anything contained in the last section, the author of a trust may in its creation prescribe to whom the real property to which the trust relates shall belong in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust." (Civ. Code, sec. 864.)

"3. Where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors." (Civ. Code, sec. 866.)

"4. Where a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustees in contravention of the trust is absolutely void." (Civ. Code, sec. 870.)

"5. When the purpose for which an express trust was created ceases, the estate of the trustee also ceases." (Civ. Code, sec. 871.)

"6. A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful." (Civ. Code, sec. 2279.)

In the present case, the city of Los Angeles was the author of the trust, and not having provided in the creation of such trust to whom the property should belong upon a failure or termination thereof had a right to transfer the property, and the purchaser took subject to the trust. The plaintiffs, having purchased, stand in the position which their grantor would have occupied but for the conveyance.

The fact that the deed from the city of Los Angeles to Sanchez was in form a *quitclaim* does not alter the

position of plaintiffs; taken together with the act of the legislature, it constituted him an assignee of all the interest of the city. As provided by section 864 of the Civil Code, the city might "transfer or devise such property, subject to the execution of the trust."

The reversion, if such it may be termed, of the property upon the execution of the trust was in no sense the acquisition of another title.

The defendant went into possession as the trustee of an express trust.

For a series of years he has devoted nearly all of the land deeded to him for cemetery purposes to agricultural and horticultural purposes, has sold a portion of it, and now deliberately urges as reasons why he should not be required to convey: —

1. That a small portion of the land is still devoted to cemetery purposes, and therefore the objects of the trust are not consummated; and
2. That he holds the land adversely to all the world, the plaintiffs included, except the portion sold and the parcel occupied by the graves, as to which parcels he disclaims all title.

The answer to these propositions is: —

1. It appears that, except as to the small subdivision in the southeast corner, the land was never devoted to the purposes of a cemetery, and there was as to the portions not used, when it was established that it could not be used for such purpose, a resulting trust created by operation of law in favor of the city of Los Angeles and its assigns. This principle of equity is recognized by the Civil Code, quoted *supra*.

2. The city of Los Angeles terminated the trust relation by abolishing the cemetery in 1861, as it had a right to do, and thereupon it became and was the duty of the trustees to reconvey the property.

The duty of the city to the friends and relatives of deceased persons buried in the cemetery became a ques-

tion as between the city and its grantees and such friends and relatives of the deceased so interred, and after its abandonment as a cemetery such duty did not concern the trustees.

3. The defendant cannot be permitted to retain possession as a trustee after repudiating his trust and claiming adversely. To permit such a course would be inequitable and an encouragement to fraud.

By such a rule, the trustee could remain in possession by virtue of his office, and at the same time claim adversely until his claim ripened into a title under the statute of limitations.

The court below had full jurisdiction to do what was essential to be done in the premises, and by its judgment, it seems to us, did do what was proper.

There was no necessity for the appointment of other trustees, as suggested in the complaint. The action of the court in requiring the plaintiffs to take the plat containing the bodies of deceased persons, subject to the easement or right of sepulture, until such bodies were lawfully removed, was all that was required.

A court of equity will at all times see to it that trustees are appointed to manage trust property when required for its safety or proper administration, but it will not do so when no good result is to be accomplished thereby. If, however, it shall at any time become necessary or proper to appoint trustees, the Superior Court has ample authority to do so. (Civ. Code, secs. 2287-2289.)

The contention of the defendants that no proper case is made for the removal of the defendants cannot be sustained.

The allegations of the complaint charge a state of facts sufficient to warrant their removal, — nay, more: to make it the duty of the court to remove them.

They answered to the complaint, and under section 580 of the Code of Civil Procedure, the court was authorized to grant any relief consistent with the case

made by the complaint and embraced within the issue.

The complaint set up the trust and all the facts connected with it, and alleges that the trustee has violated his trust, has repudiated such trust, that he has used the trust property for his own benefit, and that he is an unfit person to be trustee, etc.

These things being true, the court had a right to remove the trustee, and if necessary, to appoint another in his place. The court did this in effect by requiring the trustee to convey the property to the plaintiffs, and providing that the plaintiffs should hold the lot in which the bodies are buried, upon the conditions and subject to the servitude imposed by the decree.

We see nothing in the action of the court below inconsistent with the case of *Weisenberg v. Truman*, 58 Cal. 63. That was an action of ejectment, and the court held that the legal title being in the defendants, plaintiffs could not recover. This is an action in equity against the trustee, charging both a breach and a completion of the trust, and seeking for either or both of such causes to compel him to convey the title, for the want of which it was held the plaintiffs could not recover in the action of ejectment.

The error, if any, in refusing the motion for nonsuit was cured by the testimony subsequently introduced by defendant. (*Ringgold v. Haven*, 1 Cal. 108; *Smith v. Compton*, 6 Cal. 24; *Perkins v. Thornburg*, 10 Cal. 189; *Winans v. Hardenbergh*, 8 Cal. 291.)

We are of opinion the judgment of the court below was correct, and that the order granting a new trial should be reversed.

FOOTE, C., and BELCHER, C. C., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the order is reversed.

THORNTON, J., and MCKEE, J., concurred in the judgment.

[No. 11173. In Bank.—July 30, 1886.]

A. M. BARLEY, RESPONDENT, *v.* R. T. BUELL, APPELLANT.

CONTRACT — AGREEMENT TO PAY COMMISSION — CONSIDERATION. — Services to be rendered by a promisee in securing a loan for the promisor is a sufficient consideration to support a promise to pay a commission if the loan is obtained.

APPEAL from a judgment of the Superior Court of Santa Barbara County.

The action was brought to recover ten thousand dollars from the defendant as commissions in securing a loan. The material allegations of the complaint are, that on May 15, 1884, the defendant agreed with the plaintiff in writing that if the plaintiff should sell certain land for the defendant for an amount over and above a sum then due thereon, and the surplus should be received, the defendant would pay to the plaintiff one half of the surplus; or if the defendant secured a loan from any source with which to redeem the land, then the plaintiff should receive a commission of ten thousand dollars, as per the terms of a certain mortgage. The complaint further alleged that the mortgage was never in fact made; that the terms intended to have been inserted therein in case the same had been made were that the mortgage should secure the payment by the defendant to the plaintiff of the sum of ten thousand dollars, of which sum three thousand dollars was to have been paid when a loan was obtained by the defendant with which to redeem the land, and that the plaintiff did not recollect the terms on which the remaining seven thousand dollars was secured to be paid. It was also alleged that the defendant did secure a loan, with which he redeemed the land. The further facts are stated in the opinion of the court, and in the opinion of Mr. Justice Thornton.

W. C. Stratton, for Appellant.

W. H. H. Hart, and *A. R. Cotton*, for Respondent.

BELCHER, C. C.—This action was commenced to recover the sum of ten thousand dollars for services alleged to have been rendered by the plaintiff in procuring a loan for the defendant.

The defendant demurred to the complaint, and his demurrer being overruled, answered.

The case was tried by a jury, and a verdict returned in favor of the plaintiff for three thousand dollars, on which judgment was entered.

The appeal is from the judgment, and rests upon the judgment roll.

It is claimed for the appellant that the complaint was insufficient, and that the court erred in overruling the demurrer. The complaint was undoubtedly somewhat ambiguous, but it was not demurred to on that ground. In our opinion, it stated a cause of action for the three thousand dollars recovered, and that the alleged promise to pay that sum was based upon a sufficient consideration.

We think the judgment should be affirmed.

FOOTE, C., and SEARLS, C., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

THORNTON, J., concurring.—When this cause was before Department Two of this court for decision, I drew up an opinion affirming the judgment, and stating the reasons for such conclusion. I adhere to that opinion, and file it herein as my opinion in the cause.

The following is the opinion of Mr. Justice Thornton above referred to, rendered in Department Two on the 30th of January, 1886:—

THORNTON, J.—We are of opinion that under the allegations of the complaint the plaintiff could have and recover the amount of three thousand dollars, for which a verdict was rendered in his favor. There is no difficulty as to the consideration of the promise to pay. The consideration was services to be rendered in procuring a loan, and there was a promise to pay sufficiently definite averred in the complaint as regards three thousand dollars, the amount of the verdict.

As to the seven thousand dollars, the complaint was too indefinite to recover any part of it, but the verdict for three thousand dollars can be sustained under the allegations of the complaint.

Judgment affirmed.

[No. 11529. In Bank.—July 30, 1886.]

MARTHA BROWN, RESPONDENT, v. EUGENE R.
PLUMMER, APPELLANT.

APPEAL FROM JUDGMENT — SECOND APPEAL IS VOID — DISMISSAL.
— Where an appeal from a judgment has been regularly taken and perfected by an undertaking, and is pending in the Supreme Court, a second appeal from the judgment, attempted to be taken by the same party, is a nullity, and will be dismissed.

APPEAL from a judgment of the Superior Court of Los Angeles County.

Motion to dismiss appeal. The facts are stated in the opinion of the court.

Edwin Baxter, for Appellant.

Bicknell & White, and *C. Cabot*, for Respondent.

THORNTON, J.—Motion to dismiss an appeal.

In this case there were two appeals from a judgment taken by defendant, one on the 28th of January, 1886,

and the other on the 1st of March following. The judgment was entered on the 4th of January, 1886.

The respondent (plaintiff below) moved to dismiss both appeals in one and the same notice. The motion to dismiss the appeal of the 28th of January was made on the ground that the party appealing did not file the transcript in time. The motion to dismiss the appeal of the 1st of March was made on the ground that the first appeal was pending when the second was taken.

The motions came on to be heard on the 7th of April last, and the appeal first taken was ordered to be dismissed on the ground above stated.

As to the second appeal, it is urged, that as such appeal was taken while the first was pending, it was a nullity, as there cannot be two appeals pending at the same time from the same judgment.

It appears that the first appeal was in all respects regularly taken and perfected by an undertaking on appeal. When the second appeal was taken, the time for filing the transcript on the first appeal had not expired. The first appeal was then a valid, existing appeal to this court.

In *Hill v. Finnigan*, 54 Cal. 312, 313, a judgment was entered in the court below on the 12th of August, 1879, and on the 5th of December an order was entered denying a motion for a new trial. On the 23d of December the defendant served and filed a notice of appeal from the judgment and order, and on the same day filed an undertaking on appeal. An exception to the sureties on the undertaking was filed, and the sureties failed to justify. On the 3d of February, 1880, the defendant erroneously supposing that the appeal first taken had become ineffectual by reason of the failure of the sureties to justify, served and filed another notice of appeal from the judgment and order, and another undertaking.

This Court (Department One) held that the failure of the sureties to justify did not render the appeal ineffectual, that the appeal of the 23d of December was a valid

one, and vested this court with jurisdiction of the cause. The opinion as to the second appeal thus proceeds: "It follows that the attempted appeal of February 3d was a nullity, for there was nothing then pending in the District Court from which an appeal could be taken." (54 Cal. 314.)

Concurring in the rule laid down in the case cited, and the reasons given for it, we must hold that the appeal in this case taken on the 1st of March was a nullity, as the appeal of the 28th of January was valid and binding when the appeal of the first of March was taken, and on the day last named there was nothing in the court below from which an appeal could be taken.

It follows from the foregoing that the appeal of the 1st of March must be dismissed.

So ordered.

MYRICK, J., MCKINSTRY, J., ROSS, J., SHARPSTEIN, J., MORRISON, C. J., and MCKEE, J., concurred.

[No. 11038. In Bank.—July 30, 1886.]

JUAN M. LUZO ET AL., RESPONDENTS, *v.* COMMERCIAL BANK OF SAN DIEGO ET AL. JUAN DE TORO, ADMINISTRATOR, ETC., OF AGUSTIN OLVERA, DECEASED, APPELLANT.

ESTATE OF DECEDENT — SPECIFIC PERFORMANCE — CONTRACT FOR SALE OF LAND — JUDGMENT AGAINST EXECUTOR AFTER RESIGNATION — HEIRS NOT BOUND. — Where an action for the specific performance of a contract for the sale of land is brought against a defendant as the executor of the will of the deceased vendor after the resignation of his executorship has been accepted by the Probate Court, and without joining the heirs of the deceased, a judgment rendered therein against him as executor does not bind the heirs.

ID. — ORDER ACCEPTING RESIGNATION OF EXECUTOR — PRESUMPTION OF REGULARITY. — An order of the Probate Court accepting the resignation of an executor and discharging him from his trust is presumed to be regular, and cannot be collaterally attacked.

APPEAL from an interlocutory decree of the Superior Court of San Diego County, and from an order refusing a new trial.

The action was brought for the partition of certain lands in the county of San Diego. The lands in question originally belonged to one Agustin Olvera, whose title the parties interested in the appeal each claim to have acquired. The plaintiff Luco and those holding under him claim under the judgment referred to in the opinion. The appellant claims as the administrator of the estate of Agustin Olvera. The further facts are stated in the opinion of the court.

Works & Titus, and Smith, Brown & Hutton, for Appellant.

The judgment purporting to be rendered against the executor after his resignation had been accepted was void as against the estate of the heirs of Olvera. (*Griffith v. Frazier*, 8 Cranch, 9; *Kane v. Paul*, 14 Pet. 33; *Lewis v. Nichols*, 38 Tex. 54; 3 Wait's Actions and Defenses, 268 269.) The order accepting the resignation was not void, and cannot be collaterally attacked. (*Haynes v. Meeks*, 10 Cal. 110; S. C., 70 Am. Dec. 702; *Lucas v. Todd*, 28 Cal. 182; *Haynes v. Meeks*, 20 Cal. 288; *Ramp v. McDaniel*, 12 Or. 108.) The title of the heirs of Olvera could only be divested by making them parties to the action. (Pomeroy on Remedies, secs. 366-368; *Watson v. Mahon*, 20 Ind. 223; *Potter v. Ellice*, 48 N. Y. 321; *Brenham v. Story*, 39 Cal. 179; *Johnson v. S. F. Sav. Union*, 63 Cal. 554; *Morgan v. Morgan*, 2 Wheat. 290; *Buck v. Buck*, 11 Paige, 170.)

Levi Chase, W. J. Hunsaker, Thomas J. Arnold, A. B. Hotchkiss, and H. P. Irving, for Respondents.

The judgment against the executor was binding on the heirs. (*Carpentier v. Oakland*, 30 Cal. 446; Code Civ.

Proc., secs. 369, 1582, 1600, 1602, 1603; *Cunningham v. Ashley*, 45 Cal. 491; *Meeks v. Vassault*, 3 Saw. 206; *Bayley v. Meeks*, 11 Pac. C. L. J. 408.)

MYRICK, J.—The question involved in this appeal is, whether a judgment in favor of Luco against one Castro Olvera as executor of the last will of Agustin Olvera is valid so as to bind the heirs and devisees of the testator.

Agustin Olvera in his lifetime made a contract for the conveyance to Hartman of an interest in real estate. Agustin died testate, and Castro Olvera received letters testamentary, and entered upon the duties of his office. Luco, assignee of the contract, brought an action against Castro, as executor, to compel the execution of a deed according to the terms of the contract. Castro was served with summons. He failed to answer, and judgment was rendered in accordance with the prayer of the complaint. The suit was commenced October 15, 1880. Prior to the commencement of the suit, viz., February 11, 1878, an order was made by the Probate Court in which were pending the proceedings for the settlement of the estate of Agustin Olvera, deceased, in which order it was stated that Castro had tendered his resignation, and had rendered a full and true account of his executorship, and his resignation was accepted, and his accounts as rendered, approved, settled, and allowed; and the court "ordered, adjudged, and decreed that said letters of executorship be set aside, and on turning over all the effects and property in his hands to his successor, hereafter to be appointed by this court, and upon filing a receipt in full," etc., that he be discharged. No successor was appointed until after the decree in the suit of *Luco v. Olvera*. It thus appears that Castro Olvera was executor during the pendency of that suit, or there was a vacancy in the office. If there was a vacancy, the judgment against Castro did not bind the heirs and devisees of Agustin, and in the case at bar the property embraced within the decree against Castro should not

in this action have been decreed to Luco upon the basis of that judgment.

Section 1427 of the Code of Civil Procedure authorizes any executor or administrator to resign his appointment, having first settled his accounts and delivered up all the estate to the person appointed to receive the same; and if there be delay in settling the accounts and delivering the estate, or from other cause the circumstances of the estate or the rights of those interested require it, the court may before the settlement and delivery is completed revoke the letters, and appoint an administrator either general or special.

The Probate Court had jurisdiction of the subject-matter then before it, viz., the resignation of the executor, and it had jurisdiction of the parties interested. Having such jurisdiction, all presumptions are in favor of the regularity of its proceedings and the validity of its order (Hittell's Gen. Laws, sec. 1229), and the order accepting the resignation cannot be collaterally attacked. (*Haynes v. Meeks*, 20 Cal. 288; *Lucas v. Todd*, 28 Cal. 185; *Haynes v. Meeks*, 10 Cal. 110; S. C., 70 Am. Dec. 702.)

Of the land set off by the decree to Luco, 6,083.2,743 acres constituted the interest claimed by him under the decree against Castro Olvera, and is the interest involved in this appeal. The parties have stipulated that in other respects the partition may proceed. We are of opinion that Luco did not by the suit spoken of acquire the above-named interest.

The decree, so far as it relates to the interest of Luco in the 6,083.2,743 acres is reversed, as is also the order refusing a new trial, and the cause is remanded for a new trial as to such interest.

SHARPSTEIN, J., MCKEE, J., Ross, J., and MCKINSTRY, J., concurred.

Rehearing denied.

[No. 11152. In Bank.—July 30, 1886.]

EUGENIE H. SCHROEDER, PETITIONER, *v.* SUPERIOR COURT OF SAN MATEO COUNTY ET AL., RESPONDENTS.

ESTATE OF DECEDENT — APPOINTMENT OF SPECIAL ADMINISTRATOR — PRIOR APPOINTMENT OF EXECUTRIX — SUSPENSION AND REMOVAL. — Where letters testamentary have been issued to an executrix, the superior court has no power afterwards to appoint a special administrator of the estate, unless the executrix is first suspended or removed.

ID. — EXECUTRIX NOT REMOVED BY APPOINTMENT OF SPECIAL ADMINISTRATOR. — An *ex parte* order appointing a special administrator does not operate as a removal of an executrix previously appointed.

ID. — MARRIAGE OF EXECUTRIX — EFFECT OF. — Under section 1352 of the Code of Civil Procedure, the marriage of an executrix does not *eo instanti* deprive her of the power to act. It merely renders her incompetent, so that she may be proceeded against for suspension and removal as provided by the code.

PROCEEDING for a writ of review to annul an order of the Superior Court of San Mateo County appointing one Caroline Hawes the special administratrix of the estate of Horace Hawes, deceased. Horace Hawes died testate on the 19th of December, 1884. The petitioner, his then surviving widow, was nominated as the executrix of his will, and letters testamentary thereon were issued to her on the 22d of January, 1885. On the 2d of July, 1885, she married J. B. Schroeder, and has since been his wife. The order appointing the special administratrix was made on the 15th of July, 1885, without notice to the petitioner, and before she had been suspended or removed as executrix. The further facts are stated in the opinion of the court.

J. C. Bates, and D. M. Delmas, for Petitioner.

George C. Ross, for Respondents.

THE COURT. — This is an action to annul by *certiorari* an order of the Superior Court appointing a special administratrix. The petitioner was duly appointed executrix of the will of deceased, and has never been suspended

or removed. The Superior Court had therefore no power to appoint the special administratrix. (Code Civ. Proc., sec. 1411.)

If it be said that the order appointing a special administratrix operated a removal of the executrix, the conclusive answer is, that she has never been cited to appear, nor did she appear, to show cause why her letters should not be revoked. (Code Civ. Proc., secs. 1436-1438.)

It is urged, however, that by virtue of section 1352 of the Code of Civil Procedure, when the executrix married her authority was "*extinguished*," and that the fact of marriage deprived her *eo instanti* of all her powers. But as we have seen, if this construction were given the section last cited, it would follow that no special administrator could be appointed. We think when section 1352 is read in connection with sections 1350, 1411, 1436, 1437, and other sections, it sufficiently appears that the words "her authority is extinguished," are employed as the equivalent of "she ceases to be competent." She becomes incompetent, and may be proceeded against for suspension and removal as provided in section 1436 and the sections immediately following.

Are all the acts of an executrix who has secretly married, or married without the fact having reached the knowledge of the judge, absolutely void? If so, they are void, and may be attacked or disregarded after a final accounting and discharge.

It would be difficult to distinguish between one never competent to serve as executrix and one whose capacity to serve as such has become extinguished. But if one originally appointed executrix was in fact under age or a convict, she is clothed with all the powers of the office until she is suspended or by proper proceedings removed. Does a different rule obtain where by reason of an act done *in pais* one originally competent has made herself incompetent?

The intent of the statute is apparent from the language employed. If doubt remained as to the proper interpretation of the sections of the code, we conceive it would be proper so to interpret them as to afford the executrix an opportunity to admit or deny the marriage, and as requiring an adjudication which shall be record evidence of the marriage (if the court shall find the marriage had taken place), and which shall relieve subsequent proceedings of administration free from all liability to collateral attack.

Order annulled.

THORNTON, J., concurred in the judgment.

MYRICK, J., and SHARSTEIN, J., dissented.

Rehearing denied.

[No. 9990. In Bank.—July 30, 1886.]

SILAS COX ET AL., RESPONDENTS, *v.* F. S. CLOUGH ET AL., APPELLANTS.

WATER RIGHTS — ADVERSE POSSESSION AND USER — CLAIM OF RIGHT. — An adverse possession and user of water for five years continuously and uninterruptedly, with the knowledge of and to the injury of the true owner, will bar the right of the latter thereto; but a mere claim of right to the use and enjoyment of the water, however long continued, will not have that effect.

ID. — STATUTE OF LIMITATIONS — DENIAL OF RIGHT TO POSSESSION. — The mere denial by the owner of the right of the adverse user to the possession of the water is not a sufficient interruption thereof to prevent the statute of limitations from operating as a bar.

ID. — FINDINGS — EVIDENCE. — The findings on the plea of the statute of limitations examined, and held sufficient, and supported by the evidence.

APPEAL from a judgment of the Superior Court of San Bernardino County, and from an order refusing a new trial.

The facts are stated in the opinion.

Byron Waters, and Curtis & Otis, for Appellants.

Rowell & Rowell, and H. M. Willis, for Respondents.

SEARLS, C.—This is an action to determine the right to the use of the water of certain springs, and of a stream flowing therefrom, situate in the county of San Bernardino.

According to the allegations of the complaint, plaintiffs have a right to the uninterrupted use and flow of five ninths, and the defendants are entitled to the flow and use of four ninths, of the water of San Timoteo Creek, and they pray judgment that they are so entitled, and that defendants be enjoined from interfering with the flow of water five out of every nine days, etc.

Defendants, in addition to other defenses, pleaded the statute of limitations.

The cause was tried by the court without a jury, written findings filed, and judgment entered thereon, in which it was adjudged and decreed that the plaintiffs were entitled to the use of one half of the waters of San Timoteo Creek flowing from or through the lands of both plaintiffs and defendants, save and except the water of certain springs, the waters of which do not flow to and into the creek, and a perpetual injunction was decreed in accordance with the rights as thus established.

The appeal is by defendants from the judgment, and from an order denying a motion for a new trial.

Appellants contend that the judgment should be reversed for want of findings upon the issues raised by their plea of the statute of limitations.

The seventh finding of the court, against which the argument of appellants is directed, is defective as a finding of fact under the statute.

The finding is in effect, that ever since the issuance of a certain patent, the defendants and their grantors have claimed the right to the exclusive use of all the waters of the stream to be used upon their land for agricultural

and domestic purposes, but said right has never been acquiesced in by the plaintiffs and their predecessors in interest, who have disputed the right of the defendants to such exclusive use of the waters, and claimed an equal right with defendants to the use of the same for like purposes.

An adverse possession and user of water for five years, continuously and uninterrupted, with the knowledge of and to the injury of the true owner, will bar his right thereto. (*Union Water Co. v. Crary*, 25 Cal. 509; *Davis v. Gale*, 32 Cal. 35; *Evans v. Ross*, 65 Cal. 439.)

But a mere claim of a right to the use and enjoyment of water, however long continued, will not ripen into adverse title thereto.

It is the actual appropriation, followed by open, notorious, continuous, and exclusive possession for the time limited by statute under claim of title, that gives the right.

So, too, on the other hand, if the defendants used and held the water adversely for five years next before suit was brought, the mere disputing their right to such possession by the plaintiffs would not prevent the bar of the statute.

The peaceable possession must be disturbed, the continuity of such possession broken, within the statutory period, in order to defeat the plea, if otherwise supported by proof.

The seventh finding might be literally true,—that is, defendants and their grantors might have “claimed the right to the exclusive use of all the waters,” and yet they may never have been for a moment in possession of any such waters.

It follows that unless the other findings settle the question raised by this issue, the error assigned must be upheld.

Referring to such other findings, and it appears:—

1. Under the fourth finding, that the lands owned by

plaintiffs were public lands of the United States until they or their grantors acquired title thereto, which was as follows: J. R. Frink on the ninth day of August, 1872; Silas Cox on the twentieth day of August, 1874; Berry Roberts, 1877; George M. Frink, September 2, 1878.

2. The sixth finding is to the effect that defendants or their predecessors did not appropriate the water of said stream to their exclusive use, *or at all*, while the lands of plaintiffs or any part thereof was the property of the United States, nor prior to the issuance of the patent to Rubidoux, their grantor.

If defendants did not appropriate the water while any part of the lands of plaintiffs was the property of the United States, then they did not appropriate it prior to the second day of September, 1878, for that is the date of the patent to George M. Frink.

The complaint in this cause was filed August 13, 1883, less than five years after the date of such patent. It must therefore follow from these findings that defendants had not been in the exclusive possession of the water for five years prior to suit brought.

It is true that by the seventh finding the claim of right to the exclusive use of all the waters of the stream is made to run back to the date of the Rubidoux patent, which is August 13, 1872.

Taking these several findings together, and it will be seen they are not inconsistent.

In substance, they say the defendants and their grantors have claimed the exclusive right to all the waters of the stream since August 13, 1872, but they had not appropriated such waters to their exclusive use as against the plaintiffs up to September 2, 1878.

The whole theory of the defendant's plea of the statute of limitations is founded upon appropriation and exclusive adverse possession of all the water for five years, and the findings negative the facts essential to support the plea.

Does the testimony support the findings?

In an examination of this question, we are met with the difficulties usually attendant upon an inquiry into the origin and acquisition of the right to the use by individuals of water for irrigation.

The appropriation of water for mining purposes through ditches conducting it away from the natural streams of the country is usually preceded by a formal location or designation of the quantity of water to be claimed, the character, size, grade, and extent of the ditch, flume, or viaduct through which it is to be conducted; all of which specifications afford a criterion by which to measure and limit the extent of the right when consummated by an actual appropriation.

Like observations apply to the appropriation of water on a large scale for agricultural or mechanical purposes.

In appropriating water for irrigation by agriculturists of land adjacent to the small streams, so far as our observation extends, as in the present case, no extended works are required, and the quantity of water actually appropriated is at first limited to the wants of the appropriator, and gradually expands with the increasing demands of the owner, which are usually in direct ratio with the increased acreage brought under cultivation.

In the one case, the right may be said to be created,—to spring up full grown, with definite limits and bounds; in the other, it grows up imperceptibly, and the criterion by which to measure it at one date cannot be relied upon at another.

We need not, therefore, be surprised in this last class of cases at finding the testimony of different witnesses varying greatly when speaking of facts only treasured in memory, or obtained from observation at different periods.

Again, the problem is complicated by the fact that the water is frequently used only at intervals, as the wants of the appropriator may demand, and the lower appro-

priator on the same stream having found the water flowing, and having also used it at intervals during each year, and having accommodated his wants to the fitful supply, in process of time ceases to remember aught except the important fact of his user, and is ready to say in all honesty and sincerity that his appropriation has been regular and continuous.

Appropriation and user of water are facts to be determined like any other facts from the testimony adduced; and in view of all the testimony, we do not feel warranted in disturbing the findings of the court below upon the ground that they are not supported by the evidence.

These observations cover the points relied upon by appellants, and we are of opinion that the judgment and order appealed from should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Rehearing denied.

[No. 9938. In Bank.—July 30, 1886.]

A. L. BATH, APPELLANT, *v.* JOSE VALDEZ ET AL.,
RESPONDENTS.

TENANTS IN COMMON — ADVERSE POSSESSION — OUSTER. — Where a tenant in common of land is in possession thereof, acknowledging or with knowledge of the rights of his co-tenants, there must be, in order to constitute an ouster by him of his co-tenants, such acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the co-tenants that an adverse possession and disseisin are intended to be asserted against them; and this rule applies wherever a co-tenant enters under a conveyance which purports to convey a moiety, or any portion less than the whole, or merely the interest of the grantor.

ID. — DEED OF ENTIRETY — EXCLUSIVE POSSESSION UNDER — STATUTE OF LIMITATIONS. — When a conveyance of land is made by a party in the exclusive possession under a deed which purports to con-

vey the whole of the property, and the grantee enters into the open and notorious possession of the whole without notice of a co-tenancy, the entry will be presumed to be in the assertion of an exclusive right in severalty, and is equivalent to an express declaration on the part of the grantee that he enters claiming the whole for himself, and is therefore such a disseisin as sets the statute of limitations in motion in his favor and against his co-tenants.

D.—**DECREE OF DISTRIBUTION — ESTOPPEL.** — Under such circumstances, the grantee is not estopped to set up the statute of limitations against the heirs of a former owner by reason of the fact that the decree of distribution of the estate of such owner distributed the land to the heirs.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order refusing a new trial.

The facts are stated in the opinion.

J. Rousseau, and Graves & Chapman, for Appellant.

The facts were sufficient to establish an adverse possession against the defendants. (*American Co. v. Bradford*, 27 Cal. 367; *Simson v. Eckstein*, 22 Cal. 595; *Kimball v. Lohmas*, 31 Cal. 159; *McCracken v. San Francisco*, 16 Cal. 636; *Grim v. Curley*, 43 Cal. 252; *Unger v. Mooney*, 63 Cal. 586; *Nickle v. McFarlane*, 3 Watts, 165; *Parker v. Proprietors, etc.*, 3 Met. 91; S. C., 37 Am. Dec. 121; *Prescott v. Nevers*, 4 Mason, 330; *Chambers v. Pleak*, 6 Dana, 421; *Boulton v. Hamilton*, 2 Watts & S. 294; Wood on Limitation of Actions, sec. 266.) The appellant is not estopped, by the decree of distribution in the Valdez estate, from setting up the statute of limitations. (*Arrington v. Liscom*, 34 Cal. 381; *Theller v. Such*, 57 Cal. 447.)

Bicknell & White, G. M. Holton, Howard & Robarts, H. A. Barclay, and H. Allen, for Respondents.

The defendants were tenants in common, and the evidence was insufficient to show a disseisin of them by the plaintiff or his grantors. (*Barrett v. Coburn*, 2 Met. 513; *Forward v. Deetz*, 32 Pa. St. 72; Freeman on Co-tenancy, secs. 221, 229; *Trenouth v. Gilbert*, 63 Cal. 407; *Prescott v. Nevers*, 4 Mason, 330; *Wall v. Wayland*, 2 Met.

158; *Thurston v. Masterton*, 9 Dana, 234; *Hart v. Gregg*, 10 Watts, 189; *Forward v. Deetz*, 32 Pa. St. 73; *Barnitz's Lessee v. Case*, 7 Cranch, 456; *Story v. Saunders*, 8 Humph. 669; *Seaton v. Son*, 32 Cal. 483; *Miller v. Myers*, 46 Cal. 539; *Trenouth v. Gilbert*, 63 Cal. 407; *Northup v. Wright*, 24 Wend. 225.) All that the appellant proved was sole possession, improvements, paying taxes, and reception of profits. It was a silent possession, and however exclusive, the respondents had no notice of its adverse character. Such a possession is wholly insufficient to constitute an ouster as between co-tenants. (*Colman v. Clements*, 23 Cal. 247; *Seaton v. Son*, 32 Cal. 484; *Miller v. Myers*, 46 Cal. 539; *Carpenter v. Mendenhall*, 28 Cal. 484; *Carpenter v. Mitchell*, 29 Cal. 330; *Packard v. Johnson*, 57 Cal. 180; *Keyser v. Evans*, 30 Pa. St. 509; *McClung v. Ross*, 5 Wheat. 116; *Tyler on Ejectment*, 882; *Sedgwick & Wait on Trial of Title*, 540, 541; *Green v. Tripp*, 56 Cal. 209). The decree of distribution in the Valdez estate is conclusive upon the rights of the defendants. (Code Civ. Proc., secs. 1666, 1908; *Hill v. Dcn*, 54 Cal. 23; *Freeman v. Rahm*, 58 Cal. 111; *Estate of Hudson*, 63 Cal. 457; *Estate of Garraud*, 36 Cal. 277; *Noe v. Splivalo*, 54 Cal. 210; *Holcomb v. Sherwood*, 29 Conn. 420.)

SEARLS, C.—This action was brought to quiet title to the north half of lot eight (8), block three (3), of Ord's survey of the city of Los Angeles.

The decree of the court below established the ownership of the plaintiff to an undivided one half of the whole of lot eight (8), and that certain of the defendants were the owners of the other undivided half of said lot, in the proportion of one twelfth each, and that plaintiff had not acquired the interest of the defendants by adverse possession.

The appeal is prosecuted by plaintiff from the judgment, and from an order denying his motion for a new trial.

In 1862, Julian Valdez had title to the premises as the

common property of himself and his wife, Manuela. In 1863, Julian Valdez died intestate, leaving him surviving Manuela, his widow, and his mother and several brothers and sisters, as his heirs. In April of that year, the widow obtained letters of administration. In 1865, Manuela intermarried with one Chavez, and thereafter, in the same year, she and her then husband executed a deed of the premises to one Peppers, by which they remised, released, and quitclaimed "all that lot," describing a tract including the premises in controversy. Under this deed, Peppers took and retained possession until, in July, 1872, she executed a grant, bargain, and sale deed to Burrows, and from Burrows the title comes by mesne conveyances of grant, bargain, and sale to plaintiff. Plaintiff's grantors were respectively in the undisturbed possession of the premises during the periods while they had title; they placed improvements on the property, received the rents, and had the entire enjoyment thereof. Plaintiff purchased in January, 1882, and this suit was commenced in October, 1882. The court also found:—

"That the said plaintiff, his grantors, ancestors, and predecessors, from the 4th of October, 1865, have received all the rents, issues, and profits of the premises, paid all taxes that have been imposed thereon, and occupied the same, and that neither the said plaintiff nor his grantors or ancestors or predecessors, or any of them, ever gave any notice, actual or otherwise, to the defendants, or any of them, that he or they or any of them intended to or did or were claiming and holding the said premises or any part thereof adverse to the said José E. Brigido, Vicente, Juan, Felipe, and María de Los Angeles Valdez, and Guadalupe V. de Rocha, or either or any of them, nor was the said plaintiff, or the said Burrows, or Roques, or the said Dassaud, or the said Goodwin, or any or either of them, ever heard to make or assert any claim to the land in controversy adverse to the said defendants, Valdez or Rocha, or any of them, or

under whom they claim, prior to the commencement of this action."

The court found further that neither the plaintiff nor his grantors, Dassaud, Roques, or Goodwin, or any or either of them, had or claimed to have any knowledge or notice of the interests or claims of the defendants, or any of them, in or to the premises until after the purchase of plaintiff in 1882.

From the marriage of the widow of Julian Valdez, in 1865, until 1882, nothing was done in the administration of the Valdez estate; but in 1882 Brígido Valdez, one of the brothers of the deceased, obtained letters, and such proceedings were had that in 1883, after the commencement of this action, distribution of the property was made by the Superior Court, sitting in probate, one half to Burrows, grantee of Manuela, and the other half to brothers and sisters of the deceased, — one twelfth each, — the mother and one brother having died in the mean time.

The court below based its decree on two propositions, viz.: 1. The plaintiff had not acquired the property as against the heirs of Julian Valdez by virtue of the statute of limitations; and 2. He was estopped by the decree of distribution in probate from asserting that the Valdez heirs had no title.

Some question was made at the hearing in this court as to whether the parties in interest were all before the court.

By a memorandum filed April 9, 1886, we are referred to the various amendments, pleadings, supplemental pleadings, and stipulations whereby they were brought in and the objection obviated.

There is on file a written consent on the part of defendants and respondents that the decree be so modified that the undivided twelfth interest in the premises awarded to Vincente Valdez be decreed to belong to the plaintiff, whereby it is conceded plaintiff is entitled to a

decree for an undivided seven twelfths (7-12) of the premises.

The plaintiff brought his action to quiet title to the north half of lot 8. His testimony showed:—

1. That he had purchased such north half of the lot, and no more; and

2. That he claimed the north half, and no more, by virtue of the adverse possession of himself and his grantors.

The decree should therefore in any event be so modified as to award to plaintiff the undivided seven twelfths (7-12) of the north half only of lot 8.

Such modification of the decree can be made by the court below without the necessity of a retrial of the cause, provided a new trial is not made necessary by the validity of the other errors assigned.

These alleged errors involve the two propositions above mentioned as the basis of the decree, and to them we address our attention: 1. Did plaintiff establish a title under the statute of limitations as against defendants, the heirs of Julian Valdez?

The findings are against the claim under the statute.

It is true that the prominent facts which negative plaintiff's adverse holding under the statute of limitations are to be found in the conclusions of law.

This displacement, however, does not alter or detract from their efficacy as facts, and under the former rulings of this court does not prevent the finding from being accepted as sufficient to support a judgment. (*Jones v. Clark*, 42 Cal. 192; *Breuner v. Ins. Co.*, 51 Cal. 107; *Edwards v. Sonoma Valley Bank*, 59 Cal. 148.)

We shall therefore treat the findings as sufficient in this respect to support the judgment, and confine our attention to the question whether or not the findings are warranted by the evidence.

The testimony on the subject is all one way, and shows that in 1865 Manuela Valdez, the widow of Julian Val-

dez, having intermarried with one Chavez, united with her husband in the execution of a quitclaim deed to one Peppers, by which they remised and quitclaimed to the latter lot No. 8, etc., which deed was properly acknowledged and recorded in 1866.

Peppers entered into possession of the lot, and retained such possession until July, 1872, when she conveyed by deed of grant, bargain, and sale the entire lot to Burrows, and from the latter the title to the north half of the lot passed in July, 1875, to Dassaud and Roques, under whom plaintiff claims through sundry mesne conveyances, all purporting to convey the legal title.

The several deeds of conveyance were recorded at or about the date of their execution.

Plaintiff leased the north half of the lot in 1872 from Burrows for a term of three years, entered into the exclusive possession under his lease, erected improvements thereon, and occupied the land as a tenant of the owners under these deeds until about 1876 or 1877, when he contracted for the purchase of the property from Dassaud and Roques, grantees of Burrows.

He did not obtain a deed under the agreement until January, 1882.

The evidence is ample to show, and we think shows conclusively and without conflict, that plaintiff and his grantors from July, 1875, were in the open, notorious, peaceable, continuous, and exclusive possession of the north half of the lot, claiming to hold, own, and possess the same in their own right, and adverse to all the world.

They placed improvements on the property of the value of eight thousand dollars, and had no knowledge whatever of any claim or pretended claim to said north half of the lot by the heirs of Valdez until in 1882, — a few months before this action was instituted.

We think the evidence entitled the plaintiff to a finding in his favor upon the issues joined under the statute of limitations, unless he and his grantors were bound to

give notice to their co-tenants, the heirs of Valdez, that they held adversely to them.

We infer from the findings that the court below placed great stress upon a want of such notice.

We should doubt the justice of a rule which required the purchaser of real estate from one in the actual and exclusive possession, and who enters into possession under a deed of conveyance purporting to convey the entire title in fee, and who has no knowledge of any tenancy in common therein, to give notice to tenants in common of whose claim or existence he had no knowledge.

To set the statute of limitations in motion in favor of a tenant in common and against his co-tenant requires on his part the exercise of such acts as amount to an ouster of his co-tenant.

Ouster is a wrongful dispossession or exclusion of a party from real property who is entitled to possession.

Ouster, both where the property is owned in severalty and where it is held in divided interests, depends upon the intent of the party taking and holding possession.

If a person without title enters into possession of land and subjects it to his will and dominion, claiming and exercising over it the rights of ownership, the inference of his intent to oust the true owner is patent.

A co-tenant, however, has a right of entry upon the realty, and when he does enter and exercise acts of ownership, the law presumes that he intends nothing beyond an assertion of his right, and the apparent intent to oust his co-tenant is wanting.

It is the *intent* with which the necessary acts are performed that must in all cases determine whether or not they amount to an ouster, and to hold that acts which would amount to an ouster against a stranger do not have that effect as against a tenant in common, of whose very existence the co-tenant had no notice and no information to put him on inquiry, is to assert a proposi-

tion which cannot be supported by reason or by the great weight of authority.

The true rules we think are:—

1. Where a tenant in common is in possession acknowledging or with knowledge of the rights of his co-tenants, there must to constitute an ouster be such acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature, as by their own import to impart information and give notice to the co-tenant that an adverse possession and a disseisin are intended to be asserted against him. (Freeman on Co-tenancy, sec. 221.)

2. Where a co-tenant enters under a conveyance which purports to convey a moiety, or any other portion less than the whole, or which purports to convey the interest only of the grantor, the inference is the same as in the first instance mentioned above, and the acts to constitute an ouster must be of like tenor and effect.

3. When a conveyance is made by a party in the exclusive possession under a deed which purports to convey *the whole of the property*, and the grantee enters into the open and notorious possession of the whole without notice of a co-tenancy, the entry will be presumed to be in the assertion of an exclusive right in severalty, and is equivalent to an express declaration on the part of the grantee that he enters "claiming the whole to himself," and is therefore such a disseisin as sets the statute of limitations in motion in his favor.

These propositions are substantially as laid down by Freeman in his work on Cotenancy. (Chap. 10, secs. 221, 227.)

A reference to the authorities cited under sections 223, 224, *supra*, shows that the doctrine which we have enunciated is supported by the most eminent jurists of the country, and in cases so numerous as to leave no doubt as to the weight of authority.

We are aware that a doctrine at variance with these rules is supported by the case of *Seaton v. Son*, 32 Cal. 481.

In speaking of this last case, Mr. Freeman, after stating its positions, says: "It states an unqualified proposition of law, and must therefore be considered as in direct conflict with the authorities,—as unsustained and unsustainable."

We confess to a high appreciation of the judgment and experience of the eminent jurist who prepared the opinion in *Seaton v. Son, supra*, and it is with great reluctance that we express our dissent from his views; but in the face of the very cogent reasons which seem to us to exist therefor, and in view of the weight of authority the other way, we are forced to the conclusion that if correctly reported, of which there is grave doubt, *Seaton v. Son, supra*, cannot be upheld.

Tested by the rules we have formulated, the evidence was sufficient to support the plea of the statute of limitations, and the findings are not supported by but are contrary to the evidence.

The next proposition relates to the estoppel of the plaintiff by the decree of distribution in probate, whereby the undivided one half of the property was decreed to the heirs of Valdez, and the other undivided half to Burrows as assignee of and successor in interest of Manuela Valenzuela de Valdez, the widow.

The widow of Valdez had been appointed administratrix of his estate April 30, 1863, but did nothing toward administering except to qualify. In 1865 the administratrix intermarried with Chavez.

On the twenty-seventh day of April, 1882, Brígido Valdez was appointed administrator of the estate, and such proceedings were had therein that on the twenty-fifth day of June, 1883, the decree of distribution was entered as above specified.

It does not appear that plaintiff was a party to or had

any notice of the proceedings in probate, except what is to be inferred from the usual publication of the notices as by statute required.

We may admit for present purposes that plaintiff is estopped by the decree of distribution so far as he acquired any title to the Valdez estate by the several mesne conveyances through which title from that estate passed to him.

The real question, however, remains, and is, Was he estopped by the decree from setting up the independent estate which he had acquired under the statute of limitations?

Had the plaintiff appeared in the probate proceedings and set up his title adverse to the estate, acquired by him under the statute of limitations, the court had no authority to hear and determine the question thus raised.

"The Probate Court has jurisdiction to settle *the estate* of a deceased person, and has no power, save in certain excepted instances, to determine disputes between the heirs or representatives of the deceased and third persons." (*Theller v. Such*, 57 Cal. 447.)

It is *the estate* of the deceased upon which the Probate Court administers. It is the title which the deceased had in and to real property at the time of his death, or which has inured to the estate after death and before distribution, which passes to the heirs and devisees.

If there are outstanding or adverse claims to the estate vested in third parties, they are not affected by the probate proceedings, save as in cases of liens, etc., especially provided for by statute.

Actions may be maintained by the executor or administrator of an estate to recover possession of the real property, for partition thereof, or to quiet title thereto. (Code Civ. Proc., secs. 1581, 1582.)

The Probate Court may inquire if the estate has an interest in or title to real property, and if this question is decided in the affirmative, may distribute such estate;

but it has no jurisdiction to determine the quality of the title, whether it be good or bad, but will leave the parties to pursue their remedies in a proper form. (*Estate of John Dunn*, Myrick's Prob. Rep. 122.)

Judgments in probate are conclusive between the parties and their privies in respect to the matter directly adjudged when litigating for the same thing or under the same title, as in the case of other judgments. (Code Civ. Proc., sec. 1908.)

But the title of plaintiff under the statute of limitations was not and could not be litigated and determined in the Probate Court; hence the judgment of that court distributing the property did not affect that title, and plaintiff is not estopped by the decree.

It follows from these views that the judgment and order appealed from should be reversed, and a new trial ordered.

BELCHER, C. C., and FOOTE, C., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded for a new trial.

THORNTON, J., and MCKEE, J., dissented.

Ross, J., expressed no opinion.

Rehearing denied.

[No. 11235. In Bank.—July 31, 1886.]

DAVID BURROUGHS ET AL., APPELLANTS, *v.* YSIDORA B. DE COUTS, EXECUTRIX, ETC., OF CAVE J. DE COUTS, DECEASED, ET AL., RESPONDENTS.

TRUST DEED — DELIVERY — SURRENDER BY TRUSTEE — CANCELLATION — EJECTMENT — EQUITABLE DEFENSE. — The action was brought to recover the possession of certain land originally owned by one Soto. The plaintiffs' claim to have derived title to the demanded premises after the death of Soto, by a conveyance from

the trustee and *cestui que trust* under a deed of trust alleged to have been executed by Soto, and empowering the trustee and beneficiary to convey in case of his death pending the trust. The answer alleged that the trust deed was never delivered by Soto to the trustee, but merely deposited with him for safe-keeping, with the understanding that it should be returned for cancellation on demand, and that with the consent of the beneficiary the deed was surrendered to Soto, and canceled by the destruction thereof. *Held*, that the answer was sufficient to constitute an equitable defense.

ID. — ACQUIESCENCE BY BENEFICIARY — EVIDENCE — FINDING. — The court found that the trust deed was surrendered with the intention and agreement that the trust therein provided for should cease, and the property be owned by Soto as if the deed had never been made; that the beneficiary, with full knowledge of the facts, acquiesced therein; and that it was intended that a proper deed should be executed reconveying the property to Soto and terminating the trust, but on account of neglect the deed was never executed. The evidence showed that upon the redelivery of the trust deed, it was for some time in the possession of the beneficiary, who was the wife of Soto; that during his lifetime he managed and possessed the property as his own; that at his death he devised only a portion of it to her, and the residue to his children; that she was appointed and acted as the executrix of his will, described the property as belonging to his separate estate, submitted to a division of it as in the will provided, sold her interest in it as devised to her, and never asserted any claim under the trust deed until after twenty-four years. *Held*, that the finding was within the issues and sustained by the evidence.

ID. — ELECTION — CONFLICTING INTERESTS. — *Held further*, that the evidence was sufficient to sustain a finding that the beneficiary elected to take under the will, and not under the trust deed.

PLEADING — DEFECT OF PARTIES — ANSWER — DEMURRER — IMMATERIAL ERROR. — Where a demurrer to a separate defense in an answer setting up a defect of parties plaintiff is erroneously overruled, the error is without prejudice to the plaintiffs if the defendants subsequently abandon the defense.

DEED — RECORD — EVIDENCE OF EXECUTION AND DELIVERY. — Conceding that the record of a deed which is introduced in evidence without objection is *prima facie* evidence of the genuineness, due execution, and delivery of the original, still it is only *prima facie* evidence of those facts, and may be rebutted.

ID. — FINDING — DELIVERY — EVIDENCE. — A finding that certain deeds under which the plaintiffs claim were never delivered, *held*, supported by the evidence.

DECREE OF PARTITION — PROBATE COURT — ESTOPPEL — TITLE FROM DECEDENT. — Where a decree of partition of certain land, alleged to form part of the estate of a decedent, is rendered by the probate court, a party thereto is estopped from afterwards asserting any other title derived from the decedent adverse to that of his co-tenants under the decree.

GUARDIAN — APPOINTMENT OF — NOTICE TO RELATIVES — CONSENT — RECORD. — Under the statute in force in May, 1866, the appointment of a guardian of the estate of a minor cannot be col-

laterally attacked for insufficiency of the notice to the relatives of the minor of the application for guardianship, if the record recites that all the near relatives of the minor in the county consented to the appointment.

ID. — SALE OF LAND BY GUARDIAN — ACTION TO RECOVER — STATUTE OF LIMITATIONS. — Under section 369 of the probate act, an action to recover lands sold by a guardian must be brought by the minor within three years after arriving at majority; otherwise the action is barred.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order refusing a new trial.

The facts are stated in the opinion.

Arnold & Jones, and Works & Titus, for Appellants.

Leach & Parker, Conklin & Hunsaker, and George H. Smith, for Respondents.

SEARLS, C. — This is an action of ejectment to recover certain premises situate in the county of San Diego, and known as the rancho Los Vallicitos de San Marcus, containing two square leagues of land, more or less.

The cause was tried by the court, and findings in writing filed, upon which judgment was rendered in favor of defendants, from which and from an order denying a new trial plaintiffs appeal.

The first error assigned is based upon the action of the court in overruling the demurrer of plaintiffs to the sixth count of defendants' answer.

The demurrer is upon the ground that the sixth count of the answer does not state facts sufficient to constitute a defense to plaintiffs' cause of action.

The sixth defense to the complaint sets out by averring the truth of, and makes a part of the defense, the first, second, third, fourth, and fifth paragraphs of the second defense, which paragraphs may be summarized as follows:—

In 1840, the governor of California granted to Alvarado and Sepulveda the demanded premises.

In 1852, Lorenzo Soto, claiming the premises as the

successor of the grantees, filed his petition for confirmation of the grant with the board of United States land commissioners.

That the commissioners rejected the grant, and the District Court of the United States on appeal reversed the decree of the board of land commissioners and confirmed the grant.

Thereafter, and on the 1st of March, 1883, the United States issued a patent in due form for said land to Lorenzo Soto, his heirs and assigns, and that all the interest or title which plaintiffs or either of them have in the demanded premises is derived under said grant, and under Lorenzo Soto.

That on February 21, 1859, said Lorenzo Soto and one José Machado signed and acknowledged a certain writing, in which the former conveys in trust to the latter, among other property, the demanded premises, the grantee to pay over the net proceeds to María Ignacio Moreno de Soto, the wife of the grantor, during her life, and upon her death the property was to revert to the grantor or his heirs or assigns, subject to the proviso that the grantor, trustee, and beneficiary might jointly convey any or all the property during the continuance of the trust, or in case of the death of Soto, pending the trust, then the trustee and beneficiary could convey.

That this deed of trust was never delivered to Machado, the trustee, but was left with him for safe-keeping only, with the understanding that it should be returned to Soto for cancellation on demand; and within one year thereafter, with the consent of the wife, it was surrendered to the grantor and canceled by a destruction thereof.

That this trust deed covered all the property Soto owned; that he had at that time one child Rosa Soto, dependent upon him for support, and that all the right, title, or interest which the plaintiff Burroughs has or claims to have in the demanded premises is derived

solely as the successor to the rights of the trustee and beneficiary under the trust deed signed, canceled, and destroyed as aforesaid.

The answer then proceeds to aver that the power to convey as contained in the writing was a personal confidence reposed by Soto in the trustee, and was separate from the trust created, and terminated with the death of Soto, who died in 1863, and that the power of sale was never exercised by Machado, the trustee.

That plaintiffs, conspiring with Tomás Alvarado and María Ignacio Moreno de Soto (now the wife of Alvarado) to defraud defendants, who own the property in fee, by purchase from said Alvarado and his said wife, procured an order from the Superior Court appointing Alvarado trustee in place of Machado, and thereupon he as such trustee, and his wife as the beneficiary, under the trust deed, conveyed the demanded property to the plaintiff Burroughs, nominally for twenty thousand dollars, but really without consideration, and to defraud defendants.

A copy of the deed of trust, marked "Exhibit A," is attached to the answer and made a part thereof, from which it appears it was duly acknowledged and recorded on the ninth day of March, 1859, in the office of the county recorder of the county of San Diego.

This sixth defense is manifestly interposed as an equitable defense to the cause of action set out in the complaint.

If it is true, an apparent title passed from Soto to his trustee, and from the successor of that trustee and the beneficiary under the trust deed to plaintiff Burroughs, which can be enforced in an action at law because fair on its face, but which for the facts set out in the defense it would be inequitable to uphold. It was therefore proper to set them out as a foundation for invoking the equitable interposition of the court against the assertion of the legal title.

Counsel for appellants overlook *two facts* stated in this

defense, without the presence of which his argument would be unanswerable. The first is, the allegation "that said Lorenzo Soto died on the twenty-third day of February, 1863."

The second, that by the terms of the trust deed, the trustee and beneficiary were authorized in case of the decease of the party of the first part (Soto) to sell and convey absolutely any or all of the trust property. Under the allegations of the answer, therefore, the conveyance to Burroughs by the trustee and the beneficiary, if the trust deed was still in force, passed the legal title to the demanded property.

The case of *Bruck v. Tucker*, 42 Cal. 352, is not in point. That was an action in which a verbal agreement to convey certain property to the grantor of defendant was set up, and if sustained, it could only be upon the ground that a case was made warranting a specific performance; and as adequacy of consideration is a *sine qua non* in actions for that purpose, the answer was held insufficient for want of a proper averment of adequate consideration proportionate to the value of the property. In the present case, defendants aver title in themselves. The manner of the averment is not free from objection, and had a special demurrer been interposed, it would probably have been sustained; but in the absence of such special demurrer, it is deemed sufficient, and we are of opinion the demurrer was properly overruled.

The seventh cause of defense to which a demurrer was for like cause interposed, treated as an answer setting up a defect of parties plaintiff, is deemed insufficient, and the demurrer should have been sustained, but as no action was afterward taken upon the issue, and being in the nature of a plea in abatement, it was waived by the defendants, and no harm accrued to plaintiffs by reason of the erroneous ruling upon the demurrer.

Appellants attack so much of the second finding of the court below as finds that Lorenzo Soto was the sole owner

of the property in controversy from 1844 to the date of the trust deed, February 21, 1859.

A reference to the record will show that the record of a deed dated the third day of March, 1853, from Lorenzo Soto and María Rosa Soto, his wife, to Antonio Serrano, conveying to the latter the demanded premises, and duly recorded on the fifth day of March, 1853, was admitted in evidence. Also the record of a deed from Antonio Serrano to María Rosa Soto under date of April 9, 1853, conveying to the latter the same premises, and recorded on the day of its date.

There is also evidence tending to show that María Rosa Soto died December 20, 1857, leaving as heirs Lorenzo Soto, her husband, and a daughter, Rosa Soto; that the latter intermarried with plaintiff Seamans, and departed this life leaving a last will devising the demanded premises to said Seamans, etc.

The position of the appellants is, that the court below, in arriving at the conclusion that Soto continued to be the sole owner of the demanded premises, based its decision upon the theory that the record of the deeds from Soto to Serrano, and from Serrano back to Mrs. Soto, was not sufficient evidence of delivery. We do not so understand the position of the court.

It may be that the court below held that under section 1919 of the Code of Civil Procedure, which provides that "a public record of a private writing may be proved by the original record, or by a copy thereof certified by the legal keeper of the record," it was only intended to say that the fact or existence of the record only can be thus proven, and that if the execution and contents of a deed conveying real property are required as evidence, it can only be had as provided in section 1951 of the same code as enacted in 1874, and after proof that the original is not in possession or under the control of the party offering the evidence.

In the late case of *Brown v. Griffith*, 70 Cal. 14, and

involving the question of the admissibility of records of conveyances as evidence, the court, referring to section 1919, *supra*, says: "But the record only proves itself as a record. The record is not made primary evidence of the original writing."

Be this as it may, if it be conceded that as the records were introduced in evidence without objection, and are therefore *prima facie* evidence of the genuineness, due execution, and delivery of the original deeds, still it was only *prima facie* evidence of those facts, and was liable to rebuttal.

And on the other hand, defendants introduced as a witness José Antonio Serrano, the grantee named in the deed from Soto and wife of March 3, 1853, and grantor in the deed to Mrs. Soto of April 9, 1853, who denied in direct terms that the deed of Soto was ever delivered to him.

The witness testified in Spanish through an interpreter, and judging from the record, his evidence does not seem altogether satisfactory, owing to his apparent want of memory in reference to most of the transactions; but the court below in such a case, with the witness before him, had greatly the advantage over us, in his opportunities for arriving at the truth.

In addition to this testimony, there were other facts of some importance as militating against the delivery of the deeds, such as the fact that no one seems to have seen the originals, or know anything of them, except what appears of record,—the records fail to show by or for whom they were recorded.

For thirty years or thereabouts after the execution of the instruments, no possession was taken or claimed under them.

Soto seems to have retained possession of the property, and to have exercised over it all the acts of ownership incidental to and illustrating such ownership.

These considerations, and some others bearing upon

the question, induce us to conclude the evidence was sufficient to warrant the court below in finding that Soto was the owner of the property during all the period of time mentioned in the second finding, for the reason that the deed from him to Serrano of March 8, 1853, was never delivered.

Appellants challenge as unsupported by evidence so much of the third finding as relates to the delivering up to Soto of the trust deed of February 21, 1859, to Machado by the latter, with the intention and agreement that any and all trust therein provided for should cease, and the property should be owned by Soto as if no such deed had been made, and that Mrs. Soto, with full knowledge of the facts, fully acquiesced therein.

There seems to us to be an important fact in the finding which is omitted in the statement of appellants, which is, that "it was intended that a proper deed should be executed reconveying said property to Lorenzo Soto and terminating said trust. But on account of neglect, said deed was never executed."

We think the court was fully warranted from the evidence in finding the facts as set out in the third finding.

The evidence of knowledge on the part of Mrs. Soto, and acquiescence, is to be found in the facts that upon the redelivery of the trust deed to Soto, it was for some time in her possession; that during the life of her husband he managed and possessed the property as his own; that at his death he devised a portion only of it to her, and the residue to his children; that she was appointed and acted as the executrix of his last will, described the property as the separate estate of her deceased husband, submitted to a division of it as in the will provided, sold her interest in it as devised to her, and so far as appears never set up or pretended to make any claim under the trust deed until 1883.

The finding is not without the issues made by the pleadings. It is true, the answer avers that the trust

deed was never delivered as a conveyance to José Machado, the trustee, but only for safe-keeping, and the finding is against this averment; but immediately the answer proceeds to aver that within one year thereafter, and with full knowledge and consent of the beneficiary, the deed was surrendered up for cancellation on demand of Soto, and destroyed, etc.,—facts which, if true, were proper to be found, subject to such conclusions of law as might be deduced from their existence, or from them and other facts combined.

Objection is made to that portion of the fourth finding in the following words: "That she, the said Maria Ygnacia Marenó de Soto, duly elected to take under said will according to the terms thereof."

It follows logically that if the trust deed executed by Soto to Machado was delivered up and canceled so as to extinguish the trust and the estate created by such deed so far as Mrs. Soto, the beneficiary, was concerned, there was no occasion for an election; but as the defense under which it is claimed she elected to take under the will is a separate one, having for its basis the assumption of the existence in full force and vigor of the trust relation between the parties, it was proper to find the facts necessary to determine the questions presented under that issue.

Whether the last will of Soto did or did not present a case requiring his wife to elect whether she would take under such last will or under the trust deed (which for present purposes we shall consider in full force and vigor) is a question of law, to be determined by other considerations than those which apply to her acts and conduct as a devisee. Assuming, however, that it was her duty to elect, we think there was sufficient evidence to sustain the finding of the court.

An election may be express, as where the party by some specific and unequivocal act whereby the intention is clearly indicated, as by the execution of a written in-

strument declaring the election; or it may be implied from the acts of the party,— from his conduct, his acts or omissions, from his mode of dealing with and treating the property, etc.

“To raise an inference of election from the party’s conduct merely, it must appear that he knew of *his right to elect*, and not merely of the instrument giving such right, and that he had full knowledge of all the facts concerning the properties.

“As an election is necessarily a definite choice by the party to take one of the properties and to reject the other, his conduct, in order that an election may be inferred, must evince an intention to elect, and *must show such an intention*.

“The intention, however, may be inferred from a series of unequivocal acts. . . . Where a widow is required to elect between a testamentary provision in her favor and her dower, any unequivocal act of dealing with the property given by the will as her own, or the exercise of any unmistakable act of ownership over it, if done with knowledge of her right to elect, and not through a clear mistake as to the condition and value of the property, will be deemed an election by her to take under the will and to reject her dower.” (Pomeroy’s Eq. Jur., sec. 515.)

There was nothing equivocal in the acts of ownership exercised over the demanded property by the widow of Lorenzo Soto.

She sold it absolutely, and conveyed what purported to be the fee of the land to Couts, the testator of the defendants, reciting in her conveyance that it was her right in the said land derived by virtue of the will of Soto, “and of her separate property.”

Both Burroughs and Seamans are estopped by the decree of partition in probate from setting up title derived from Soto adverse to that of their co-tenants under the same title. (Code Civ. Proc., sec. 1908; Freeman on

Cotenancy and Partition, secs 530–532; Freeman on Judgments, sec. 249.)

Proceedings of the courts of probate within the jurisdiction conferred upon them by the law are to be construed in the same manner and with like intendments as the proceedings of courts of general jurisdiction, and their judgments and decrees have like force and effect as judgments of the District Courts. (Hittell's General Laws, art. 1229.)

The record in the probate proceedings shows that the property belonged to the estate of Soto, deceased, and so far as we can see, the allegations of all the parties in the proceedings were to that effect, and they cannot now be heard to allege, in contradiction of the record, that what they in effect, by their silence, or by direct averments, said was true is not so in fact.

The decree of distribution in the Probate Court cannot be held binding for the purpose of giving to them property under the will of Soto to which they would not otherwise have been entitled, and at the same time as without force when they would set up rights to the property in opposition to the will or decree which settled the same title.

The objections made to the eighth finding of the court relate to the proceedings appointing José Machado guardian of the estate of Rosa Soto, the infant daughter of Lorenzo Soto, deceased, and to the proceedings under which her estate was sold, as well as to his acts as such guardian in the partition and distribution of the estate of Lorenzo Soto.

The petition under which Machado was appointed as guardian was filed May 2, 1866, and is in the usual form.

Service was waived by the attorney for the administrator, and a hearing had on the same day.

The order appointing Machado as guardian shows that the attorney for the estate was present, etc.; recites as follows: "And it appearing satisfactorily that all the near

relatives of said minor in said county are consenting hereunto," etc.

Beyond this recital, and the fact that José Serrano and María Serrano de Machado, who are shown by the record to be relatives, filed their consent in writing to the appointment, there is no evidence as to notice to relatives.

The statute then in force provided: "Before making such appointment, the judge shall cause such notice to be given to the relatives of the minor residing in the county, and to any person under whose care such minor may be, as he shall on due inquiry deem reasonable." (Hittell's General Laws, sec. 3362.)

The manner in which the notice shall be given to the relatives of the minor residing in the county is left to the judgment and reasonable discretion of the probate judge. (*Gronfier v. Puymirol*, 19 Cal. 629.)

As against this collateral attack upon the action of the court in appointing a guardian, the record affords sufficient evidence of the regularity of the proceedings to warrant the presumption of the jurisdiction of the court and the validity of its acts. (*Brodrribb v. Tibbits*, 63 Cal. 80.)

We observe no want of regularity in the proceedings under which the interest of Rosa Soto in the demanded premises was sold by her guardian to Fox, the grantor of Couts, the testator of defendants.

Rosa Soto upon becoming of age instituted proceedings against her guardian for a settlement, in which she charged him among other things, with the proceeds of this sale, and which she finally received. This was an affirmation of the sale.

Again, under the probate act (Belknap's Probate, sec. 369), as under the present Code of Civil Procedure, sec. 1806, an action to recover lands sold by a guardian must be brought by the infant within three years after arriving at majority, or it is barred, which was not done in this case.

Like considerations apply to the objections taken to the sale of the interest of Viviana Soto.

We cannot, in the limited time at our command, notice in detail all the objections made to the findings of fact and conclusions of law, and must pass the remainder of them with the observation that a labored examination of the record convinces us that the facts as found are warranted by the evidence; that the conclusions of law are properly applied; and that notwithstanding some minor errors have crept into the record, substantial justice has been done, and a correct conclusion reached in the cause.

We are therefore of opinion the judgment and order appealed from should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

THORNTON, J., expressed no opinion.

[No. 9450. Department Two.—August 2, 1886.]

HENRY COUBROUGH, APPELLANT, *v.* JAMES ADAMS, RESPONDENT.

PLEADING — STIPULATION TO ABIDE PRIOR ACTION — EVIDENCE — PLEA IN BAR. — In an action on a promissory note, where the answer pleads a prior judgment in favor of the defendant in bar, a stipulation signed by the parties and filed in the case, wherein the plaintiff admits that the indebtedness in controversy was involved in the prior action, and agrees that the subsequent action shall be determined by the prior one, is admissible in support of the plea in bar without being specially pleaded.

Id. — AMENDMENT TO ANSWER — PENDENCY OF PRIOR ACTION — DISCRETION. — Permitting the defendant at the close of the trial to amend his answer by setting up the pendency of another action involving the same cause of action, *held*, not an abuse of discretion under the circumstances of the case.

Id. — PRIOR ACTION FOR ACCOUNTING — SUBSEQUENT ACTION ON CERTAIN ITEMS. — The pendency of an action for an accounting may be pleaded in abatement of a subsequent action between the same parties founded on one or more items involved in the prior action.

ID. — SUSTAINING PLEA — PROPER JUDGMENT — ABATEMENT. — Where a plea of the pendency of a former action is sustained, the proper judgment to be entered is one abating the subsequent action, and not a judgment that the plaintiff take nothing thereby.

APPEAL from an order of the Superior Court of Alameda County refusing a new trial.

The facts are stated in the opinion.

W. S. Goodfellow, for Appellant.

William M. Pierson, for Respondent.

BELCHER, C. C.— This is an action to recover the amount alleged to be due on a promissory note executed by the defendant's testator to the order of McFarlane, Blair & Co., and by them indorsed to the plaintiff.

The complaint is in the usual form, setting forth a copy of the note, and was filed in the District Court of the third judicial district for Alameda County on the twenty-eighth day of June, 1876.

The defendant answered to the complaint, setting up the circumstances under which the note was given, and alleging that it was indorsed to plaintiff after its maturity, and had been fully paid.

At the time this action was commenced, there was pending in the District Court of the nineteenth judicial district another action, which was commenced by James Oliver, administrator of the estate of Jonas Collycott, deceased, and John Shoenbar, as plaintiffs, against David B. Blair, McFarlane, Blair & Co., James Adams, the defendant's testator, and Henry Coubrough, the plaintiff herein, as defendants.

The last-named action was commenced to dissolve a partnership alleged to have existed between the plaintiffs, Collycott and Shoenbar, and the defendant Blair, and for an accounting, and to compel Blair to surrender to the plaintiffs certain shares of stock alleged to belong to the plaintiffs. In the complaint it was alleged that Cou-

brough was the agent and employee of Blair and McFarlane, Blair & Co. Coubrough failed to answer to the complaint, and his default was entered. The defendant's testator answered, and among other things set up that he was induced by Blair to make the note in suit here as an accommodation, and that it had been fully paid. He also pleaded the commencement and pendency of this action.

Afterward, on the tenth day of December, 1878, the parties to this action entered into a stipulation as follows:—

"Inasmuch as the amount in controversy in this action is also involved in the suit in the Nineteenth District Court of San Francisco, in the action No. 2465, in which James Oliver (administrator of the estate of Jonas Collycott) and John Shoenbar are plaintiffs, and David B. Blair and others are defendants, in which said last-named suits an accounting is being had between said parties. It is therefore agreed that the matters in this action, and the claim of plaintiff therein, enter into and abide the event of said suit in the Nineteenth District Court. And it is further agreed that in the event of a judgment being given against Adams in said action in the Nineteenth District Court, he shall, upon satisfaction of the same, receive a clear receipt from said Coubrough against the judgment, given in the Third District Court of Alameda in said suit,—*Coubrough v. Adams.* All proceedings in said action in the Third District Court shall be stayed until after final decision in the case in the Nineteenth District Court, provided said case in the Nineteenth District Court be settled within three months from date hereof."

On the twenty-third day of October, 1878, the case of *Oliver et al. v. Blair et al.* was referred to a referee to try the same, and all the issues therein, and to report a judgment. The case was tried before a referee, and he reported on the nineteenth day of March, 1879, findings and

a judgment, which was afterwards entered as the judgment in the case.

Upon the trial, the note now in suit was in issue, and it was found that it had been paid and extinguished. The defendants were Blair and McFarlane. Blair & Co. afterwards moved for a new trial, but before their motion was acted upon stipulated that the motion be denied, and then waived any appeal.

Subsequently the defendant filed a supplemental answer in this case, setting up the judgment in the case of *Oliver et al. v. Blair et al.* as a bar to the action. When the case came to trial, the plaintiff introduced his note in evidence, and rested. The defendant then, against the objections of plaintiff, was permitted to read in evidence the stipulation herein before recited, and also the judgment roll in *Oliver et al. v. Blair et al.*, and the reporter's notes of the evidence in that case, showing that the note here sued on, and the debt evidenced thereby, was involved in the accounting had before the referee. The plaintiff then in rebuttal introduced in evidence notices of appeal and undertakings on appeal by all of the defendants, with proof of service and filing; and the defendant, in surrebuttal, introduced and read in evidence the stipulation before referred to, that their motion for new trial be denied, and waiving an appeal.

After argument of the case, the defendant was permitted by the court to amend his supplemental answer by setting up that there was at the time of the commencement of this action another action pending, to wit, the said action in the Nineteenth District Court between the same parties and for the same cause.

Judgment was then entered in favor of the defendant.

The plaintiff moved for a new trial, and his motion being denied, appealed from the judgment and order.

The first point made by the appellant is, that the court erred in admitting in evidence the stipulation first referred to, for the reason that no foundation for such evidence

had been laid by supplemental answer or otherwise; and for the further reason that the stay of proceedings provided for in it was conditioned upon a final settlement of the case in the Nineteenth District Court within three months.

The stipulation was signed by the parties, and was filed in the case. By it the plaintiff admitted that the amount in controversy in this action was involved in the other action, and he "agreed that the matters in this action, and the claim of plaintiff therein, enter into and abide the event of said suit." The defendant had pleaded the judgment in the other action in bar of this, and he offered the stipulation in support of that plea. It was not necessary to plead the stipulation specially, and it seems to us that it was clearly admissible for the purposes for which it was introduced.

The claim that the stipulation was inadmissible because the stay of proceedings for which it was provided was dependent upon the final settlement of the other case within three months cannot be maintained. It was not offered to obtain a stay of proceedings, as the case was then on trial, and so far as appears, without objection from either side.

The second point made is, that the court erred in permitting the defendant, at the end of the trial, to amend his answer by setting up the pendency of the other action at the time of the commencement of this action, and then ordering judgment.

The allowance of amendments to pleadings is a matter within the discretion of the trial court, and this court can only interfere with the exercise of that discretion when it appears to have been abused. It has been frequently held that it is within the power of the trial court to permit amendments whenever at any stage of the trial they are necessary to the purposes of justice. (*Lestrade v. Barth*, 17 Cal. 235.)

Here it had appeared that during the trial the defend-

ants in the other action had appealed from the judgment in it to the Supreme Court, notwithstanding they had stipulated not to appeal, and the plaintiff here was thereby seeking to avoid the effect of that judgment as a bar to his action.

Under the circumstances, we fail to see any abuse of its discretion in the action of the court below.

But it is claimed that the amendment was insufficient, because the defense of a prior *lis pendens* applies only when the plaintiff in both suits is the same person, and both are commenced by himself, and not to cases where there are cross-suits by a plaintiff in one suit who is defendant in the other; and *Ayres v. Bensley*, 32 Cal. 630, is cited to sustain the claim.

Undoubtedly, the rule stated is the general rule, but it ought not to apply to an action for an accounting between the same parties, where one or more items of the accounting are afterwards made the subject of a separate suit. In such an action, all the parties are actors.

It is claimed further that the same matters were not in issue between the plaintiff and defendant in the other action. The answer is, that it is shown by the stipulation of the parties and by the record in that action that they were. Besides, it was alleged in the complaint in that action, and admitted by his default, that the plaintiff here was the mere agent and employee of the other defendants. And as their appeal was dismissed (5 West Coast Rep. 528), and the judgment as to him was affirmed, both in Department and Bank (6 West Coast Rep. 374 and 8 West Coast Rep. 214), he has nothing to complain of.

The last point made is, that the judgment should have been that the action abate, and not in favor of the defendant on its merits.

The judgment was, that the plaintiff take nothing by his action, and that the defendant recover his costs.

In our opinion, the proper judgment was not entered.

It should have been a judgment abating the action. The judgment should therefore be reversed, and the cause remanded, with directions to the court below to modify the judgment as above indicated.

SEARLS, C., and FOOTE, C., concurred.

THE COURT. — For the reasons given in the foregoing opinion, the order denying a new trial is affirmed. The judgment is reversed and cause remanded, with directions to the court below to modify the judgment as indicated in said opinion.

Hearing in Bank denied.

[No. 8535. In Bank. — August 2, 1886.]

PIERRE ALBERT LAFARGUE ET AL., RESPONDENTS, v. HENRY D. HARRISON ET AL., APPELLANTS.

LETTER OF CREDIT — LIABILITY OF DRAWER — GUARANTY OF CREDIT TO THIRD PERSON. — In 1877, John Mel & Sons, merchants of San Francisco, having a branch house at Bordeaux, France, and doing their banking business with the plaintiffs, obtained from the defendants, then doing business under the name of Falkner, Bell & Co., the following letter of credit: —

“ SAN FRANCISCO, Sept. 20, 1877.

“ THE MERCHANTS’ BANKING COMPANY OF LONDON (LIMITED),
112 CANNON STREET, LONDON, — Dear Sirs: At the request of
Messrs. John Mel & Sons of this city, we hereby authorize Messrs.
A. Lafargue & Co., of Bordeaux, to draw on you at sixty days'
sight for our account to the amount of three thousand pounds
sterling (£3,000).

“ All drafts must be drawn at Bordeaux, and be accompanied by due advice. This credit to be in force for twelve months, from 31st October, 1877, to 31st October, 1878. We are, dear sir, yours
faithfully,

“ FALKNER, BELL & CO.”

The plaintiffs and the bank were duly advised of the issuance of the letter, which was deposited by Mel & Sons with the plaintiffs as security for advances that might be made to them by the latter. During the period in which the letter of credit was to remain in force, and upon the faith and credit thereof, the plaintiffs advanced about nineteen thousand dollars to Mel & Sons, of which a balance

of \$13,441.54 remained unpaid. On the 10th of October, 1879, they drew a bill of exchange for three thousand pounds on the Merchants' Banking Company at sixty days' sight, which they requested that bank to pay, and charge according to the terms of the letter of credit. The draft was accompanied by a letter of advice and notice, and was duly presented for acceptance and payment. The bank refused to accept or pay it, whereupon it was protested for non-acceptance and non-payment. The action was brought on the letter of credit to recover the amount of the draft. *Held*, that the defendants were liable, as the letter of credit was a guaranty by them of the credit of Mel & Sons during the time and for the amount therein specified, and of the acceptance and payment by the Merchants' Banking Company of all drafts drawn by the plaintiffs in conformity with the letter.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of Commissioner Foote.

Wilson & Wilson, for Appellants.

The letter of credit was special, and created no privity of contract between the plaintiffs and the defendants. (Edwards on Bills and Notes, 239; Robinson's Practice, 284; Daniel on Negotiable Instruments, 706-714; *Taylor v. Wetmore*, 10 Ohio, 494; *Birckhead v. Brown*, 5 Hill, 634; *Union Bank v. Costa's Ex'rs*, 3 N. Y. 214; *Robbins v. Bingham*, 4 Johns. 477; *Walsh v. Bailie*, 10 Johns. 180; *Nat. Bank v. Grand Lodge*, 98 U. S. 123.)

McAllister & Bergin, for Respondents.

The defendants are liable upon the letter of credit. (*Lawrason v. Mason*, 3 Cranch, 492; *Dorland v. Mulhol-
lan*, 10 Ohio St. 192; *Lonsdale v. Lafayette Bank*, 18 Ohio,
126; *Russell v. Wiggin*, 2 Story, 213; *Carnegie v. Morri-
son*, 2 Met. 381; *Barney v. Newcomb*, 9 Cush. 46; *Scott v.
Pilkington*, 15 Abb. Pr. 284; *Monroe v. Pilkington*, 14
How. Pr. 250; *Union Bank v. Coster*, 1 Sand. 563; S. C.,
3 N. Y. 214; *In re Agra and Masterman Bank*, L. R. 2 Ch.
389.)

The COURT.—For the reasons given in the opinion filed herein December 30, 1885, judgment and order affirmed.

THORNTON, J., dissented.

The following is the opinion above referred to, rendered in Bank.

FOOTE, C.—From the record in this action, it appears that in the year 1877, John Mel & Sons, being engaged in a general commission business in the city of San Francisco, having a branch house in the city of Bordeaux, France, and doing their banking business with Lafargue & Co., the plaintiffs in this action, obtained from the defendants, then doing business under the name and style of Falkner, Bell & Co., a letter of credit as follows:—

“ SAN FRANCISCO, Sept. 20, 1877.

“ THE MERCHANTS’ BANKING COMPANY OF LONDON (LIMITED), 112 CANNON STREET, LONDON,—*Dear Sirs:* At the request of Messrs. John Mel & Sons of this city, we hereby authorize Messrs. A. Lafargue & Co., of Bordeaux. to draw on you at sixty days’ sight for our account to the amount of three thousand pounds sterling (£3,000).

“All drafts must be drawn at Bordeaux, and be accompanied by due advice. This credit to be in force for twelve months, from 31st October, 1877, to 31st October, 1878. We are, dear sir, yours faithfully,

“ FALKNER, BELL & Co.”

Of the issuance thereof, Lafargue & Co. and the bank above mentioned were duly advised. Mel & Sons deposited the letter in the bank of Lafargue & Co. as a guaranty or security for advances that might be made by that bank to them, and upon the faith and credit of such guaranty, and of another on the part of some ladies, the relatives of the Mels, which was also at the same time so deposited, Lafargue & Co., between the times mentioned in the letter of credit as the period during which it was to remain in full force and effect, made advances to Mel

& Sons in the sum of 99,645 francs and 60 centimes, equivalent to the sum of \$19,231.53 of the money of the United States of America, of which sum the other guarantors above mentioned paid plaintiffs 30,000 francs, leaving unpaid 69,645 francs and 60 centimes, equivalent to the sum of \$13,441.54 in money of the United States.

On the tenth day of October, 1878, on the faith of the said letter of credit, and for liabilities contemplated by the parties at the time of the issuance thereof, the plaintiffs drew a bill of exchange, which, translated into the English language, reads as follows:—

“B. P. £3,000. BORDEAUX, Oct. 10, 1878.

“At sixty days' sight, pay on the single of exchange to our order the sum of three thousand pounds sterling, value received by us, which charge according to the letter of credit of Messrs. Falkner, Bell & Co. dated San Francisco, September 20, 1877.

(Signed) “A. LAFARGUE & Co.

“The Merchants' Banking Co. of London (Limited), 112 Cannon Street, London.”

This draft the pleadings admit to have been accompanied by a letter of advice and notice. It was presented on the 14th of October, 1878, to the London bank for acceptance, which was refused. On the 16th of December, 1878, it was presented to that bank for payment, which was also refused. Thereupon it was protested for both non-acceptance and non-payment. Lafargue & Co. brought this action to recover from the defendants the amount of that draft, basing their demand upon the obligations imposed upon Falkner, Bell & Co. by virtue of the terms of the letter of credit.

Judgment for the amount claimed was rendered in favor of the plaintiffs; the defendants entered their motion for a new trial, and it was denied. From the order made in the premises, and the judgment, the defendants appealed.

Letters of credit are general or special, and whether

one partakes of the characteristics of the former or the latter class depends upon the reasonable construction to be placed upon the language specially employed therein.

Daniel on Negotiable Instruments, at page 666, vol. 2, says:—

“A letter of credit may be defined to be a letter of request whereby one person requests some other person to advance money or give credit to a third person, and promises that he will repay or guarantee the same to the person making the advancement.

“It is called a general letter of credit when it is addressed to all persons in general, requesting such advance to a third, and a special letter of credit when addressed to a particular person by name.

“When addressed to all persons, it is in effect a request made to any person to whom it may be presented, and any one may accept and act upon the proposition contained in it, and when he does so, that which before was indefinite and at large becomes definite and fixed. A contract immediately springs up between the person making the advancement and the writer of the letter, and it is thenceforward the same thing in legal effect as though the name of the former had been inserted in the letter in the beginning.” (*Birchead v. Brown*, 5 Hill, 643.)

And the same legal effect follows action by the person to whom a special letter of credit is addressed. He has the right to act upon it, and when he accepts the letter placed in his hands by the person for whose benefit it was written, and gives him credit in compliance with it, there springs from the letter and its acceptance a distinct contract, which is auxiliary to the principal contract, between the person for whose benefit the letter was written and the person to whom it was addressed, which is binding upon the writer of the letter. And this writer is upon the default of the debtor liable to those who gave credit in accordance with its terms. (Civ. Code, sec 2860.)

It is contended by counsel for the defendants that the one in hand is a special letter of credit, and that no privity exists between the writers thereof and the plaintiffs.

The question, then, to be determined is, whether or not the proposal or proposition contained in that letter was intended to be made, or, what is the same thing in legal effect, could from its verbiage reasonably be construed to be intended to be made, to Lafargue & Co.

"To construe the words of such instrument with wise and technical care would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world. (*Lawrence v. McColmont*, 2 How. 426.)

We must look, then, at the letter itself, and give to its terms and the language employed a reasonable interpretation, according to the intent of the parties as disclosed by the instrument, read in the light of surrounding circumstances and the purposes for which it was made. If there is anything ambiguous in it, it should be taken most strongly against the parties who have induced Lafargue & Co. to act upon and give credit to their supposed intent. (*Belloni v. Freeborn*, 63 N. Y. 383.)

What was the proposition fairly deducible from the language of that letter? It is this:—

We guarantee the credit of Mel & Sons for twelve months, from October 31, 1877, until October 31, 1878, to the amount of three thousand pounds sterling, and for that amount we authorize Lafargue & Co. at Bordeaux to draw on the Merchants' Bank of London (Limited) for our account by sixty days' sight draft or drafts, the same to be drawn at Bordeaux.

In other words, Falkner, Bell & Co. said to Lafargue & Co.: Give Mel & Sons credit in your bank to the extent of three thousand pounds, and draw for it draft or drafts at Bordeaux upon the Merchants' Bank of London (Lim-

ited), and we will guarantee their acceptance and payment at that bank, provided they are drawn at sixty days' sight, are accompanied with due advice and notice to that bank, and are drawn between the 31st of October, 1877, and the same date in 1878.

This proposition thus made and accepted by Lafargue & Co. was, we think, sufficient to create a contract between the writers and Lafargue & Co.

"If A says to B, advance so much money to C, and I will repay you," it is an original promise, and if the money is paid upon the faith of it, it has been always held an obligatory promise. (*Townsley v. Sumrall*, 2 Pet. 182.)

Where the evidence showed the credit to have been given upon the faith of a letter by the person for whom the letter was intended, Chief Justice Marshall said:—

"The writing was certainly intended by the defendants to give a credit to another. The defendants are bound by every principle of moral rectitude and good faith to fulfill the expectations which they thus raised, and which induced the plaintiffs to part with their property." (*Lawrason v. Mason*, 3 Cranch, 492.)

If one of two must suffer, it should be the one from whose act the injury results.

If Lafargue & Co., acting in good faith, had a right reasonably to infer from the language of Falkner, Bell & Co.'s letter that they were authorized to give credit to Mel & Sons, as they did, and that the drafts specified in that instrument would be paid by the London bank, then common justice requires the defendants should make good their guaranty; and since by their act in revoking the letter of credit the bank failed to pay the plaintiffs' draft, they should assume the place of the bank and pay it.

There is no case which we have had cited to us, or which we have been enabled to find, which in all respects is similar to the one under consideration. But that

which most closely resembles it is *Carnegie v. Morrison*, 2 Met. 381.

There a Boston merchant was indebted to some merchants in Gottenburg, Sweden, and procured from the agent in Boston of a banking-house in London a letter of credit as follows:—

BOSTON, March 4, 1837.

"MESSRS. MORRISON, CRYDER & Co., LONDON:—" Mr. John Bradford of this city having requested that a credit may be opened with you for his account in favor of Messrs. D. Carnegie & Co. of Gottenburg for three thousand pounds sterling, I have assured him that the same will be accorded by you on the usual terms and conditions. Respectfully, your obedient servant,

"FRANCIS J. OLIVER."

The London bankers were advised of the issuance of the letter, and that it would be forwarded to Carnegie & Co.; and it was forwarded to them by the party in whose favor it was written, and he requested them "to value for the amount of three thousand pounds at ninety days' sight, and pass the same to his credit."

Relying upon this letter of credit, Carnegie & Co., and in compliance with its terms, drew a bill on the London bankers, which was presented for acceptance and payment, and both refused. Carnegie & Co. then instituted an action to recover the amount of that draft, basing their right of recovery on the letter of credit.

The defendants alleged that they were under no obligation to pay Carnegie & Co.; that no contract existed between them.

Chief Justice Shaw said upon that point, among other things:—

"The objection to such an action and the grounds of this defense are, that the immediate parties to the transaction were Bradford (the person in whose favor the letter was written) on the one side, and the defendants on the other; that to this transaction the plaintiffs were

strangers, and that, as Bradford acquired some right under it, and had a remedy upon it against the defendants, their contract must be deemed to be made with him, and not with the plaintiff. But this position presupposes that the same instrument may not constitute a contract between the original parties, and also between one or both of them and others who may subsequently assent to and become interested in its execution,—an assumption quite too broad and unlimited, which the law does not warrant. In a common bill of exchange, the drawer contracts with the payee that the drawee will accept the bill; with the drawee, that if he does accept and pay the bill, he, the drawer, will allow the amount in account if he has funds in the drawee's hands; otherwise, that he will reimburse him the amount thus paid. He also contracts with any person who may become indorsee that he will pay him the amount if the drawee does not accept and pay the bill. The law creates the privity. So in the familiar case of money had and received, if A deposits money with B to the use of C, the latter may have an action against B, though they are in fact strangers. But if C, not choosing to look to B as his debtor, calls upon A to pay him notwithstanding such deposit (as he may), and A pays him, A shall have an action against B to recover back the money deposited if not repaid on notice and demand. The law, operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded. (*Hall v. Marston*, 17 Mass. 579.)”

On page 403 of 2 Metcalf the learned judge continues as follows:—

“The court are of opinion that the promise of the defendants made by the letter of credit in the present case comes within the principle of the cases cited. Bradford was indebted to the plaintiffs, and was desirous of paying them; and he must resort to some mode of remit-

tance. He had funds, either in cash or credit, with the defendants, and entered into a contract with them to pay a sum of money for him to the plaintiffs. And upon the faith of that undertaking, he forebore to adopt other measures to pay the plaintiffs' debt. He gave the plaintiffs notice of what he had done, and sent them the instrument as authentic evidence of the fact. They assented to and affirmed it, as an act done in their behalf, and gave the defendants notice thereof, and conformably to the terms of the letter of credit, drew their bills on the defendants. The refusal to accept was a breach of the promise thus made, and in the event that happened (the insolvency of Bradford), the plaintiffs lost their debt. It would be in vain to say that this promise was not made for the benefit or (according to the terms of some of the cases) for the *interest* of the plaintiffs. The result shows that by a compliance with the plain, literal terms of their promise on the part of the defendants the plaintiffs would have received their debt. By a refusal to perform that promise they have lost it. They are therefore damnedified to the full amount of the sum for which the credit was given."

To much the same effect is the reasoning of the courts in *Russell v. Wiggin*, 2 Story, 213; *Lonsdale v. Lafayette Bank of Cincinnati*, 18 Ohio, 126; *Barney v. Newcomb*, 9 Cush. 59; *Scott v. Pilkington*, 15 Abb. Pr. 281.

We have examined with great care, and much admiration for their research, perspicuity of expression, and strength of argument, the various briefs of the distinguished counsel in this cause.

We rise from their study profoundly impressed with the belief that the plaintiffs, from the terms of the letter of credit under consideration, had a legal right to expect that the drafts drawn by them on the London bank would be paid by that bank, or that this failing, the defendants must make good to them the loss thus incurred, as they had promised.

"By a refusal to perform that promise," on the part of the defendants the plaintiffs lost their debt.

"They are therefore damnedified to the full amount of the sum for which the credit was given."

We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 11711. Department One.—August 5, 1886.]

W. C. CURTIS, PETITIONER, *v.* SUPERIOR COURT OF YOLO COUNTY, RESPONDENT.

NEW TRIAL — TIME FOR PREPARATION OF STATEMENT — EXTENSION OF BY COURT. — Under section 1054 of the Code of Civil Procedure, where the time for the preparation of a statement on motion for a new trial has been extended by stipulation between the parties, the court has power to grant a further extension, not exceeding thirty days, if the application therefor be made before the time as extended by stipulation has expired.

APPLICATION for writ of mandate. The facts are stated in the opinion of the court.

G. P. Harding, for Petitioner.

W. D. Grady, for Respondent.

Ross, J.—It appears in this case that on the day defendant in the action entitled *Wristen v. Curtis* gave notice of his intention to move for a new trial, counsel for plaintiff therein extended by stipulation the time for the preparation of the statement to a day beyond the 22d of March, 1886, and on the last-named day the court in which the action was pending, on good cause being shown, but against the plaintiff's objection, made an order extending the time twenty days from that date.

Within the time thus extended, but more than forty days after the notice of motion was given, defendant's counsel prepared and served the statement. The court afterwards became of opinion that the power to grant the last extension was wanting, and therefore refused to settle the statement. The present is an application for a writ of mandate to compel its settlement.

It is, among other things, provided by section 1054 of the Code of Civil Procedure that the time allowed by the code for the preparation of statements on motion for a new trial may be extended, upon good cause shown, by the court in which the action is pending, or a judge thereof; but that such extension shall not exceed thirty days without the consent of the adverse party. The right to extend the time necessarily presupposes that the time allowed by the code has not already expired, but since under the code the parties may by stipulation extend the time for such purpose, it is not important whether its running is kept alive by consent of the parties or by virtue of that provision of the code giving to the moving party ten days after the service of the notice of motion for a new trial within which to prepare the statement. The essential thing is, that the application to the court or judge, if made at all, be made before the time has already expired. If so made and good cause be shown, the court or judge is, we think, authorized to grant an extension, such extension, however, not to exceed thirty days without the consent of the adverse party.

It results from these views that petitioner is entitled to the writ sought. Let it issue accordingly.

McKINSTRY, J., and MYRICK, J., concurred.

[No. 11545. Department One. — August 12, 1886.]

NICHOLAS KEVERN, APPELLANT, *v.* PROVIDENCE
GOLD AND SILVER MINING COMPANY ET AL.,
RESPONDENTS.

NEGLIGENCE — EMPLOYER AND EMPLOYEE — FELLOW-SERVANT. — The action was brought to recover damages for personal injuries. The plaintiff was an employee in a mine owned by the defendants. The shaft of the mine was divided by a frame-work of posts into two compartments, one of which was provided with a ladder-way for the use of the employees. The plaintiff, while ascending the ladder, was injured by a timber which had been negligently thrown by a fellow-employee into the shaft. *Held*, that the defendants were not liable, although the partition between the compartments may have been defectively constructed or insufficient in other particulars.

APPEAL from a judgment of the Superior Court of Nevada County, and from an order refusing a new trial.

The action was brought to recover damages for personal injuries. The further facts are stated in the opinion of the court.

George D. Buckley, and John I. Caldwell, for Appellant.

Cross & Simonds, and J. K. Byrne, for Respondents.

MCKINSTRY, J. — The court below granted a nonsuit. The evidence showed that the shaft in which the plaintiff was injured had been divided by a row of posts extending down the center at a distance of about four feet from each other, firmly fixed in the roof and base-pieces; that in the space to the right of the row of posts, looking down, there was a ladder-way to be used by the men working in the mine, consisting of a row of steps about fourteen inches wide and close to the posts; that in the other compartment of the shaft there was a double-rail car-track. The plaintiff when injured was ascending the steps with a lighted candle. When plaintiff was injured, three of the posts mentioned were wanting, or not in place, one of them absent near the top of

the shaft; thus leaving there a space of over eight feet between two of the posts.

Wilcox, the only witness whose testimony is set forth in the transcript, testified that, having been directed by Truan, shift boss, about two hours previously to go up and throw a timber down the shaft, he cast into the shaft a log twelve feet long and eight inches in diameter at the smaller end. The witness said: "He told me to throw it down,—that is all I know about it. . . . The mouth of the shaft was under a building. I packed the timber to the mouth of the shaft on my back. I got it into the shaft by throwing it in. I threw it from my shoulder. I took no means to see if anybody was coming up the shaft before I threw it in. If I had looked in the shaft, and there was a man there, I should certainly have seen him. . . . If I had known there was a man in the shaft, I would have waited until he came up." The witness added that he had no time to look into the shaft; he had as much as he could do to get rid of what he had on his back; that he could have laid the timber down and run it into the shaft; that there was no danger in getting timber down the shaft if the person sending it down looked to see if there was anybody in the shaft. And he said: "I threw it into the shaft; I intended for it to go down the track-way, but it went between the center posts into the other shaft. . . . It started in the track-way. . . . I think it struck, as near as I can tell, the end of the post; went right across and struck the end of the post, and that turned it right around down the shaft. . . . I went in this way [showing]; I wasn't facing square, and I threw myself half around, and threw the timber in. . . . The shaft was dipping east, my face was south." In answer to the question, "When you dumped it off, you dumped it in such a way that it struck the post?" the witness said: "Yes; went right between the center posts, and struck the end posts." Question: "Now, if you had

put the timber down into the shaft with care, don't you think it would have gone down the track?" Answer: "I don't know." Question: "You don't know anything about that?" Answer: "I threw it in; I did not know exactly where it was going."

All the testimony showed that the immediate and proximate cause of the injury sustained by plaintiff was the negligence of his co-employee.

Section 1970 of the Civil Code reads: "An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee."

There was no evidence that if the log had been sent down with reasonable care the plaintiff would have been injured. "The proximate cause of the injury is the object of inquiry, and when discovered must be regarded and relied on." (*Hayes v. West. R.*, 3 *Cush.* 274.) Even where machinery is defective, so that otherwise a recovery might be had for an injury received, yet if the promoting cause of the injury is the negligence of a fellow-servant, no recovery can be had. (Wood on Master and Servant, p. 812.) The same rule must apply where the appliances for doing work are defective. Even if we could assume, therefore, that the partition between the two compartments of the shaft was not as complete as it should have been, or that the plaintiff would not have been injured if a continuous bulwark had been erected between the two compartments, or if the posts had been nearer together, still, as the case clearly shows that the plaintiff would not have been injured except for the gross negligence of the co-employee, and that such negligence was the immediate and proximate cause of the injury, and if the appliances furnished by the defendant had been used

with ordinary care the injury would not have occurred, the nonsuit was proper.

Judgment and order affirmed.

Ross, J., and MYRICK, J., concurred.

[No. 9548. Department One.—August 12, 1886.]

MARGARET MCNOBLE, RESPONDENT, *v.* JOSE JUSTINIANO, APPELLANT.

ADVERSE POSSESSION — TITLE ACQUIRED BY — PAYMENT OF TAXES ESSENTIAL. — Under section 325 of the Code of Civil Procedure, the title to a piece of land forming part of a larger tract, which is assessed as an entirety to the real owner, cannot be acquired by adverse possession unless the adverse claimant pays or offers to pay the taxes on the land in his possession.

APPEAL from a judgment of the Superior Court of Calaveras County.

The action was brought to recover the possession of certain land forming part of a tract of 160 acres alleged to belong to the plaintiff. The defendant pleaded the statute of limitations. The court found that for more than ten years prior to the commencement of the action the defendant had been in the actual, exclusive, uninterrupted, and continuous possession of the land, claiming the same in his own right, and that during this period the entire 160 acres had been assessed to the plaintiff, and the taxes thereon paid by her. Judgment was rendered in favor of the plaintiff. The further facts are stated in the opinion of the court.

Reddick & Solinsky, for Appellant.

Wesley K. Boucher, for Respondent.

McKINSTY, J. — The demanded premises are described in the complaint, and are a portion of a larger tract of

160 acres. The court found that taxes were assessed on the 160-acre tract for the fiscal years 1877-78, 1878-79, and 1879-80; that they were assessed to and paid by the plaintiff, and that defendant paid none of the taxes.

The proviso to section 325 of the Code of Civil Procedure reads as follows:—

“ Provided, however, that in no case shall adverse possession be considered established under the provisions of any section or sections of this code unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land.”

Taxes were assessed on the land of which defendant claims to have had the adverse possession. It is said that taxes were not so assessed because there was no separate assessment of such land. Certainly the plaintiff was not required to recognize the land alleged to have been occupied by the defendant as a separate tract by listing it for purposes of assessment separately. It does not appear that the defendant gave or offered to the assessor a list of his property containing a description of the land of which he claimed to be possessed. Had he done so, and offered to pay the tax, a different question might have been presented. Under the circumstances, the defendant was not relieved of the consequences of a failure to pay the taxes by the fact (if such be the fact) that after the assessment was made he could not pay the taxes on the land of which he claimed the possession without paying those assessed on the larger tract including such land.

It is insisted, however, that the whole purpose of the proviso is to secure the payment of taxes to the government, and inasmuch as the taxes were paid by the plaintiff, the law of the proviso was complied with. It would be a strange result if, under a law which provides that

an adverse possession can only be made out by proof of the payment of the taxes by the adverse possessor, the payment of the tax by one who is undoubtedly the owner of the land, unless the adverse possession is established, should inure to the benefit of him who seeks to make out an adverse possession. If this were the rule, the plaintiff here could never discharge his duty to the government, or preserve his title, except by aiding in the establishment of an adverse title. If, as we said with reference to the other point, the defendant had done all that he could do toward paying the taxes,—if he had sought to have the lesser tract separately assessed, and had tendered the taxes on it.—a different question might be presented. It is not the sole purpose of the statute that the taxes should be paid by somebody. The payment of the taxes by the adverse claimant is made a necessary element of adverse possession, without proof of which the adverse possession cannot be established.

One can acquire title to real property by adverse possession only to the extent and in the manner provided by statute. It was for the legislature to fix the period of limitation, and to declare what facts must be proved to establish an adverse possession for the period of the statute. With the policy or expediency of the law we have no concern, and are not authorized to interpolate in the statute words which shall give to a defendant who has not paid the taxes nor attempted to pay them the benefits of adverse possession in case the plaintiff has paid them. In the case at bar, the plaintiff was entitled to recover the demanded premises unless the defendant proved that he had paid the taxes; or unless, at least, he proved that he attempted to pay them, but was prevented from paying them by the action of the assessor or tax collector.

Judgment affirmed.

Ross, J., and MYRICK, J., concurred.

[No. 11261. Department One.—August 12, 1886.]

C. LEE ET AL., RESPONDENTS, *v.* H. W. ORR ET AL.,
APPELLANTS.

PLEADING — DESIGNATION OF PLAINTIFFS AS PARTNERS — CERTIFICATE OF PARTNERSHIP — IMMATERIAL ISSUE — FINDING.— Where the title of an action designates the plaintiffs as partners doing business under a fictitious name, but it does not appear either by the complaint or answer that the cause of action of the plaintiffs is upon or on account of any contract made or transaction had by them in their partnership name, an allegation in the answer that the plaintiffs had not complied with the law requiring the filing and publishing of a notice of the partnership is immaterial, and no finding thereon is necessary.

FRAUDULENT JUDGMENT — ACTION TO SET ASIDE — EXECUTION — ISSUANCE AND RETURN OF.— In an action by a junior judgment creditor to set aside a prior judgment and execution sale of the property of the debtor on the ground of fraud, the complaint need not allege that an execution had been issued and returned unsatisfied, where it is averred that the judgment debtor has not and never had any property except that sold under the fraudulent judgment.

APPEAL from a judgment of the Superior Court of Plumas County.

The facts are stated in the opinion of the court.

W. W. Kellogg, and E. T. Hogan, for Appellants.

Goodwin & Jenks, for Respondents.

MYRICK, J.—One of the defendants herein, H. W. Orr, obtained a judgment against the Hungarian Hill Gravel Mining Company, and by virtue of an execution issued thereon certain real estate was sold to said Orr. The plaintiffs herein obtained a junior judgment against the same company. This action was brought to set aside the former judgment and sale on the ground of fraud, and to restrain the execution of a sheriff's deed.

1. The plaintiffs in their complaint in this action entitled the suit, "C. Lee, P. C. Lee, and C. J. Lee, partners doing business under the firm name of C. Lee & Sons vs.," etc. The answer presented the issue that it

nowhere appeared in the complaint that plaintiffs had complied with the law requiring the filing and publishing of a notice of partnership. (Civil Code, secs. 2466, 2468.) The court below made no finding on this subject, and the omission is urged as ground for reversal.

It nowhere appears in the complaint, nor is it averred in the answer, that the cause of plaintiffs' action was upon or on account of any contract made or transaction had in the partnership name of the plaintiffs. The part of the title of the action relating to the plaintiffs as partners may be disregarded as surplusage, leaving the complaint as stating in effect that the judgment recovered by plaintiffs was recovered in their capacity of co-plaintiffs (not as partners).

2. The complaint alleged that the mining company had not and never had any property or assets whatever, except the property sold, as before stated, to the defendant Orr. With that allegation in the complaint, it was not necessary to allege in addition that an execution had been issued and returned unsatisfied. The finding of the court upon this subject is sufficient.

Judgment affirmed.

McKINSTRY, J., and Ross, J., concurred.

[No. 11280. Department One.—August 12, 1886.]

M. J. TERNEY, RESPONDENT, *v.* JOHN S. DOTEN,
ET AL., APPELLANTS.

SALE — CONTRACT FOR SALE OF HORSES — STATUTE OF FRAUDS — ACCEPTANCE AND RECEIPT OF PART. — The defendants agreed verbally to sell the plaintiff one hundred unbroken horses, at a specified price each, out of a band of horses belonging to them, then running at large. The contract provided that the defendants were to gather up a number of the horses of the band from time to time, from which the plaintiff was to select a certain number, and commence breaking them, after which the number so selected and broken were to be turned into the defendants' pasture, and another selection made in like manner until the whole number agreed to be sold

should be gathered up, selected, and broken. Thereupon the horses were to be paid for by the plaintiff, and then taken by him from the premises of the defendants. The defendants gathered up a number of the horses, from which the plaintiff selected twenty-two, which he broke, and turned into the pasture of the defendants. Thereafter the defendants refused to further perform their part of the contract. *Held*, that the contract was void under the statute of frauds.

APPEAL from a judgment of the Superior Court of Modoc County, and from an order refusing a new trial.

The action was brought to recover damages for the breach of an alleged contract for the sale of one hundred head of horses. The further facts are stated in the opinion of the court.

J. D. Goodwin, J. J. May, and J. M. McDonald, for Appellants.

Ewing & Clafin, for Respondent.

Ross, J.—The agreement testified to on the part of the plaintiff is within the statute of frauds, and therefore void. It was a contract for the sale of a certain lot of horses at a price exceeding two hundred dollars. The agreement was not in writing, nor was there any note or memorandum thereof made in writing, and consequently none such was subscribed by the parties to be charged, nor by any one for them. It is not pretended that any part of the purchase price was paid at the time of the agreement of sale, or at all. So that, unless there was such acceptance and receipt of a part of the horses as is contemplated by section 1739 of the Civil Code, it is clear that the agreement was invalid. The section referred to reads:—

“No sale of personal property, or agreement to buy or sell it, for a price of two hundred dollars or more is valid unless,—

“1. The agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or by his agent; or,

"2. The buyer accepts and receives part of the things sold, or when it consists of a thing in action, part of the evidences thereof, or some of them; or,

"3. The buyer, at the time of sale, pays part of the price."

The agreement as testified to on the part of the plaintiff was in effect this: Defendants agreed to sell him, and he agreed to buy, one hundred unbroken horses of a certain description at the price of seventy-five dollars each out of defendants' band of horses, then running at large on their stock range; said one hundred horses to be selected, paid for, and taken by plaintiff in this wise:—

Defendants were to gather up a number of the horses of the band from time to time, and place them in their corrals, from which plaintiff was to select not less than twenty of the description agreed on, and commence "rough breaking" them, having for that purpose the use of defendants' harness, cart, etc., after which the number so selected and broken were to be turned into defendants' pasture-field, and another selection made in like manner and for a like purpose; and so on until the whole number of one hundred agreed to be sold and bought as aforesaid should be gathered up, selected, and broken,—all of which was to be done within two months from the time of the agreement of sale. At the expiration of that time, the horses were to be paid for by plaintiff at the rate agreed on, and were then to be taken by him from defendants' premises.

Under the contract, plaintiff went to defendants' ranch, and the latter got together a large number of horses, from which the plaintiff selected twenty-two answering the description agreed on, and commenced breaking them, upon the conclusion of which he turned them into the pasture-field of defendants and waited for defendants to gather another lot from which to select another batch, in accordance with the agreement. The testimony tended to show that defendants failed in that regard, and finally

failed and refused to comply with their part of the contract, and as the verdict of the jury was against them, we take that as an established fact. The real question, however, is, Do the facts in respect to the twenty-two horses selected and broken by plaintiff constitute an acceptance and receipt of part of the lot of horses sold within the meaning of the section of the Civil Code above quoted? We think it clear that they do not. The acceptance, as said by Story in his work on Sales, sec. 276, "must be final, complete and irrevocable, and the subject-matter must have come into the absolute possession of the purchaser, or of some person authorized finally to receive it for him. . . . If the agreement be that the title of the subject-matter of sale shall remain in the vendor until a certain date when payment shall be made, it would not be binding if made verbally. Thus where A agreed to purchase a horse from B for ready money, and to take him within a time agreed upon, and about the expiration of such time A rode the horse, and gave directions as to its treatment, but requested that it might remain in the possession of B for a further time, at the expiration of which he promised to remove it and pay the price, to which B assented, and the horse died before A took him away, it was held that there was no acceptance within the meaning of the statute. (*Tempest v. Fitzgerald*, 3 Barn. & Ald. 680.)"

In the case at bar, none of the horses forming the subject-matter of the contract ever passed into the absolute possession and control of the plaintiff. There was therefore no acceptance and receipt of any of them by plaintiff within the meaning of the statute.

Judgment and order reversed, and cause remanded.

MCKINSTRY, J., and MYRICK, J., concurred.

[No. 9079. In Bank.—August 16, 1886.]

M. F. LEWIS, EXECUTRIX, ETC., OF NAT. LEWIS, DECEASED, APPELLANT, v. P. T. ADAMS, RESPONDENT.

FINDINGS — STATUTE OF LIMITATIONS. — A finding that all the allegations of the complaint are true is a sufficient finding on a plea of the statute of limitations, if the complaint contains averments showing that the statute had not run.

JOINT JUDGMENT — ACTION ON AGAINST JOINT DEBTOR — AMENDMENT — STATUTE OF LIMITATIONS. — Where an action on a judgment against several joint debtors is originally commenced against one of them alone, a subsequent amendment to the complaint, by inserting the names of the other judgment debtors as defendants, does not change the nature of the action against the original defendant, nor extend the running of the statute of limitations in his favor until the filing of the amendment.

ID. — FOREIGN JUDGMENT — REVIEW OF ERROR. — In an action on a judgment rendered in another state, error in the manner of entering the judgment will not be reviewed.

ID. — FOREIGN EXECUTRIX — MAY SUE PERSONALLY ON FOREIGN JUDGMENT. — A foreign executrix may maintain an action in this state in her individual name on a judgment recovered by her as executrix in another state on a debt due to her testator.

ID. — AVERMENTS OF OFFICIAL CAPACITY — SURPLUSAGE. — In such an action, the averments in the complaint of the official capacity of the plaintiff are mere surplusage, and may be disregarded.

APPEAL from an order of the Superior Court of Los Angeles County granting a new trial.

The action was commenced on the fifteenth day of February, 1882, by the plaintiff, as the executrix of the last will of one Nat. Lewis, against the defendant P. T. Adams, on a judgment obtained by her as such executrix in the district court of Bexar County, in the state of Texas, on the fifteenth day of March, 1877, against Adams, and Joseph Collins, James Dalrymple, and John H. Kennedy. The complaint contained allegations of the death of the plaintiff's testator, of the issuance to her by the probate court of Bexar County of letters testamentary on the will of the deceased, and of her qualification as executrix. The defendant Adams answered, alleging that the judgment was obtained on a partner-

ship demand against the judgment debtors, and pleaded the non-joinder of Collins, Dalrymple, and Kennedy. To obviate the objection of non-joinder, the plaintiff, on the 8th of July, 1884, filed an amended complaint, inserting their names as defendants. The defendant Adams answered the amended complaint by setting up the statute of limitations. The further facts are stated in the opinion of the court.

Victor Montgomery, and Smith, Brown & Hutton, for Appellant.

Thom & Stephens, for Respondent.

MCKINSTRY, J.—The action is upon a judgment of a District Court of the state of Texas,—a court of general jurisdiction. The original complaint was filed February 15, 1882, and averred that the Texas judgment was against defendant Adams, and was given and entered March 15, 1877.

On the eighth day of July, 1884, the plaintiff amended her complaint by inserting, in the appropriate connection, the names of Joseph Collins, James Dalrymple, and John Kennedy as judgment debtors and as defendants in this action. In the present action summons was not served on Collins, Dalrymple, or Kennedy, nor did either of them appear herein. The Superior Court found in favor of the plaintiff herein against the defendant Adams, but on motion of the latter granted a new trial. From the order granting a new trial plaintiff has appealed.

The court below found "all the allegations of the complaint as amended, are true." If the facts averred in the amended complaint would establish the conclusion that the statute had not run as against defendant Adams, the foregoing was a sufficient finding in favor of plaintiff on the issue of the statute of limitations. Ever since the decision in *Coveny v. Hale*, 49 Cal. 552, it has been held

that if a finding be of probative facts, from which the ultimate fact necessarily follows, it is sufficient.

There is no dispute that the finding is sustained by the evidence, but it is insisted by respondent that upon the facts as found, the judgment should have been for the defendant, and that the court below therefore properly ordered a new trial. It is urged that the foreign judgment was rendered more than five years prior to the filing of the amended complaint, and that, as the action set forth in the amendment was a different action from that sued on in the original complaint, the statute ran to the filing of the amendment.

If it should be conceded that when a trial court deduces a wrong legal conclusion from facts found, this is a ground of motion for a new trial,—as being a “decision against law” (as to which we express no opinion), the amendment did not allege a new cause of action against the defendant Adams, and there is no question here as to the running of the statute in favor of those first made defendants by the amendment. The Texas judgment was against all the defendants therein named, and if the non-joinder had not been specially pleaded, could have been introduced under the averments of the original complaint. (Code Civ. Proc., sec. 434.) As we have seen, the summons in the present action was not served on the other defendants, and if the original complaint had properly described the Texas judgment, judgment herein could have been entered against Adams alone. The liability of Adams remained the same before and after the amendment. When an action is against two or more defendants jointly liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against those served in the same manner as if they were the only defendants. (Code Civ. Proc., sec. 414.) A judgment is a contract within the meaning of the section. (*Mahaney v. Penman*, 4 Duer, 606.) The amendment, so far as defendant Adams is con-

cerned, was merely a more complete statement of the cause of action, and related to the commencement of the suit.

Treating the judgment as a joint liability, the defendant Adams cannot say that a new cause of action is for the first time set out in the amendment to the complaint as against him. It has been held in Kansas that an action on a judgment against two or more may be maintained against any one of the defendants; that it is in effect a joint and several obligation. (*Read v. Jeffreys*, 16 Kan. 534.) The contrary seems to be intimated in *Barnes v. Smith*, 16 Abb. Pr. 420. It is not necessary here to decide the question, but if the Texas judgment was the several contract of the defendant Adams, it is apparent that an amendment which merely added to the description of the judgment a statement that others as well as Adams were judgment debtors did not affect or change the liability of Adams, or constitute a new cause of action against him.

The respondent further contends that the court below was justified in granting a new trial, the evidence being insufficient to sustain the finding, because the judgment roll, read in evidence, showed an action and judgment of the court in Texas against Adams, Collins & Co., as *partners*, and upon a partnership liability. But the judgment was simply a judgment against Adams, Collins, Dalrymple and Kennedy. We refrain from saying that such a judgment, upon a declaration charging defendants on a contract made or liability incurred by them as partners, was strictly regular. It is enough that the judgment was entered, and if erroneous, it cannot here be reviewed.

Another point urged by respondent is, that the Superior Court erred at the trial in overruling defendant's objections to the evidence offered by the plaintiff. Assuming that the specifications of error in the statement for new trial are sufficiently particular, the evidence re-

fferred to as offered by the plaintiff is the record of the Texas judgment. When that record was offered, the defendant's objections to it — other than those already incidentally referred to — were:—

“ 1. Because the document shows a judgment in favor of M. F. Lewis, *executrix of the estate of Nat. Lewis, deceased*, and it appears therefrom that the plaintiff, as executrix, appointed in Texas, has no jurisdiction nor right to maintain an action in this state.

“ 2. Because the court has treated this action as an action in the name of M. F. Lewis as an individual, and has held the description of plaintiff's official capacity to be mere surplusage.”

Section 1294 of the Code of Civil Procedure, so far as it relates to any question before us, is: “ Wills must be proved and letters testamentary or of administration granted: 3. In the county in which any part of the estate may be, the decedent having died out of the state, and not resident thereof at the time of his death.” And sections 1667 and 1913 of the same code read: “ 1667. Upon application for distribution, and if it is necessary, that the estate in this state should be delivered to the executor or administrator in the state or place of his residence, the court may order such delivery to be made,” etc. “ 1913. The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that the authority of an executor or administrator does not extend beyond the jurisdiction of the government under which he was invested with his authority.”

Respondent contends that — by virtue of the foregoing provisions — the plaintiff cannot maintain this action, either in her official capacity or as an individual, and that the action could only have been prosecuted by one to whom letters were issued under the third subdivision of section 1294.

It is claimed this view is supported by *Dial v. Gary*, 14

S. C. 573. In that case, a resident of Massachusetts having died in that state, possessing a bond and mortgage executed by a resident of South Carolina, the administrator appointed in Massachusetts assigned the securities to a resident of South Carolina. The Supreme Court of South Carolina held that an action could not be maintained on them by the assignee in that state. The action was not upon a judgment recovered in Massachusetts.

Respondent also refers to Story's Conflict of Laws. In section 513 of that work, Judge Story says it has become a doctrine of the common law that no suit can be brought or maintained by any executor or administrator, *in his official capacity*, in the courts of any other country than that from which he derives his authority. But at section 522 the learned author remarks that in contemplation of law there is no *privity* between persons to whom administration is granted in different states; that a judgment recovered by a foreign administrator against the debtor of his intestate will not form the foundation of an action by an ancillary administrator in another state; but the foreign administrator himself might in such case maintain a *personal* suit against the debtor in another state, because the judgment would, as to him, merge the original debt, and make it personally due to him in his own right, he being responsible therefor to the estate.

In *Attorney-General v. Bouwens*, 4 Mees. & W. 171, Lord Abinger, speaking of conflicts of jurisdiction between different ordinaries, said it had been established that judgment debts were assets for the purposes of jurisdiction where the judgment is recorded.

Mr. Freeman, citing authority, thus lays down the rule with respect to the right of a foreign administrator to sue personally in this state on a judgment recovered by him as administrator out of this state: "A debt due to the estate of a deceased person, if sued upon and recovered by an administrator, is in law the debt of him who

recovers it, and in whose name the judgment is rendered. He holds the legal title, subject only to his trust as administrator. He may sue upon the debt in his own name without describing himself as administrator, and may therefore pursue the judgment defendant in a different state from that in which letters of administration were issued." (Freeman on Judgments, sec. 217.)

That the local administrator could not maintain an action on a judgment recovered by a foreign administrator, as such, in another state was decided in *Talmage v. Chapel*, 16 Mass. 71. There the court held: 1. The judgment debt was at law due to the foreign administrator, he being answerable to the estate of the intestate: 2. That the ancillary administrator appointed in Massachusetts could not maintain an action on the judgment, not being privy to it. Counsel for respondent herein criticise that decision, saying: "It is absurd to say that by recovering a judgment the administrator becomes chargeable with it." And counsel claim that an executor or administrator appointed here could sue here on the judgment, because the foreign judgment is in favor of the *estate* which such an executor or administrator would represent. But the Supreme Court of Massachusetts did not hold that the foreign administrator was *chargeable* with the judgment in the sense that he was bound absolutely to satisfy and pay it, but that he was answerable to the estate to the extent of using all reasonable efforts to collect the judgment. It would seem sufficiently plain that the Massachusetts administrator was not in privity with the title of the foreign administrator to the judgment, or with that of the person who had recovered the judgment, and to whom at law the judgment debt was personally due.

In *Biddle v. Wilkins*, 1 Pet. 686, the plaintiff, as administrator of one W., had recovered a judgment against the defendant in the District Court of the United States for Pennsylvania. He instituted a suit on the judgment in

the District Court of the United States for Mississippi. The defendant pleaded that he had been appointed administrator of the estate of W. by the Orphans' Court of Adams County. The Supreme Court of the United States held that the debt due upon the judgment obtained in Pennsylvania by the plaintiff as administrator of W.'s estate was due to him in his *personal* capacity, and it was immaterial whether the defendant was or was not appointed administrator of the estate of W. in the state of Mississippi.

In *Low v. Burrows*, 12 Cal. 188, the Supreme Court of this state said:—

"The second objection is equally untenable. We concede that the administrator has power over only those assets within the state where letters are granted; and we might concede that in case of notes, bonds, etc., on debtors who live and have their property beyond the jurisdiction, the administrator has no jurisdiction or dominion. But this is not the case in respect to judgments. There can be no doubt if a debtor against whom the intestate in his lifetime obtained judgment, though at the time of the death of the intestate the debtor was beyond the jurisdiction, afterwards came within the jurisdiction, the administrator might proceed to collect the money from him. The effect of a judgment, as such, unlike a note, is confined to the state where rendered. It is therefore record evidence of a debt. It may be sued on, it is true, out of the state. But it is not easy to see how an administrator of the creditor in California could take to himself as assets a judgment remaining on record in New York merely from the fact that the debtor happened for the time being to reside in California. If the debtor went back to New York, or had property there, it is clear that the California administrator could not collect the money. If he collected anywhere, it would not be by virtue of the judgment in New York vesting in him any title to it, but merely because the

transcript of the judgment gave him evidence upon which he might sue. The judgment is a record, and for any use to be made of it, or any power to enforce it, by execution or other process, must belong to the administrator in New York, or this anomaly would result: that the administrator in California would own the judgment for the purpose of suing on it in California, and the administrator in New York would own it for the purpose of collecting it by issuing execution on it in New York. We think no such doctrine can be maintained."

According to the principles recognized by all the authorities, the judgment debt herein sued was a debt at law due to the plaintiff personally, and she was fully authorized to bring and prosecute this action.

We find nothing in the provisions of the Code of Civil Procedure that affects or modifies the general principles of law which control and determine the rights of the parties hereto. Section 1913 is merely declaratory of the rule of the common law that an executor or administrator, *as such*, has no power which he can employ extra-territorially. The third subdivision of section 1294 allows letters to issue in the county "in which any part of the estate may be." But when the plaintiff recovered the judgment in Texas, the simple contract debt ceased to exist. It was merged in the judgment. The judgment was in Texas, and the simple debt was not an asset in this state which an executor or administrator here appointed could sue to recover. The Texas judgment would constitute a perfect defense to an action brought here on the original demand.

As to the second of the objections to plaintiff's evidence as above enumerated, the court below was justified "in treating the action as an action in the name of M. F. Lewis as an individual, and in holding the description of plaintiff's official capacity to be mere surplusage."

When it is not necessary for a plaintiff to sue as executor or administrator, all averments in his complaint

in relation to his official capacity may be rejected. (*Owen v. Frink*, 24 Cal. 171.) And in *Biddle v. Wilkins*, *supra*, the Supreme Court of the United States holds that if the plaintiff who has recovered a judgment as administrator in one jurisdiction, and who brings an action on the judgment in another, names himself as administrator in the last action, the averment may be disregarded.

Order reversed.

THORNTON, J., SHARPSTEIN, J., Ross, J., and MORRISON, C. J., concurred.

[No. 11267. Department One.—August 17, 1886.]

N. GREENE CURTIS ET AL., APPELLANTS, *v.* CITY OF SACRAMENTO, RESPONDENT.

DEBTOR AND CREDITOR — WRITTEN ACKNOWLEDGMENT OF DEBT — AGREEMENT TO ARBITRATE — STATUTE OF LIMITATIONS. — A written agreement between a debtor and creditor for the arbitration of a disputed indebtedness, which recites in general terms the fact of indebtedness, and contains a promise by the debtor to pay the amount of the award, whether made before or after the statute of limitations has run against the demand, is not sufficient to defeat the bar of the statute in an action brought on the original indebtedness after the statute has run.

APPEAL from an order of the Superior Court of Sacramento County refusing a new trial.

In 1876, the plaintiffs were employed by the defendant to conduct certain litigation upon a contingent fee. Being successful, they presented a claim in the sum of ten thousand dollars to the board of trustees of the defendant. On the 24th of December, 1877, their claim was rejected. On the 29th of July, 1878, the plaintiffs and defendant entered into an agreement to submit the claim to arbitration. The agreement provided that the amount of the award should be allowed by the board of trustees, and entered as a judgment against the city. Under the

agreement, on the 13th of January, 1879, an award was made in favor of the plaintiffs for six thousand dollars. On the 8th of August, 1880, the plaintiffs presented the award and their claim thereon to the board of trustees, who rejected the claim. They thereupon commenced an action upon the award, in which judgment was rendered in favor of the defendant on the ground that the award was invalid for want of notice to the parties. On the 28th of July, 1882, the present action was commenced on the original indebtedness. The defendants pleaded the statute of limitations. On the trial, after the evidence was closed, the plaintiffs asked leave to amend their complaint by inserting the compromise agreement, with an averment that the same constituted an acknowledgment and promise by the defendant. The court refused to allow the amendment. The further facts are stated in the opinion of the court.

Freeman & Bates, for Appellants

W. A. Anderson, and *A. P. Catlin*, for Respondent.

MCKINSTRY, J.—1. As was said by the learned judge of the Superior Court, "this action is not upon the original verbal promise. There is no averment that the defendant promised to pay plaintiffs what their services should reasonably be worth, and that they were worth ten thousand dollars. The averment is, [that in 1878 the defendant was indebted to the plaintiffs in the sum of ten thousand dollars for professional services, and that thereafter, on the 29th of July, 1878,] the defendant promised in writing to pay to the plaintiffs the sum of ten thousand dollars within two years from the twenty-ninth day of July, 1878; and the only promise in writing offered in evidence is the agreement to arbitrate. But that agreement contains no promise to pay ten thousand dollars, or any other specific sum of money. There was merely an agreement to submit matters in controversy to

arbitrators. They awarded six thousand dollars, and the court set aside the award. The written promise is not, therefore, the promise alleged."

If the court below had allowed the proposed amendment to the complaint, the result must have been the same.

It is urged that the recital in the arbitration agreement—"Whereas, the city of Sacramento is indebted to the firm of Curtis & Clunie for legal services rendered by said firm in the several actions, . . . and whereas, the board of trustees of said city and said firm differ as to the amount of said indebtedness," etc.—is an acknowledgment in writing such as is contemplated by section 360 of the Code of Civil Procedure.

While a debt barred by the statute of limitations may be revived by an implied promise created by a clear and unqualified acknowledgment of the debt, yet if the acknowledgment be accompanied by such qualifying expressions or circumstances as repel the idea of a contract to pay, except to the extent or upon the conditions named, no implied promise to pay absolutely is created. (*Biddel v. Brizzolara*, 56 Cal. 380.) The acknowledgment must be a direct, unqualified, and unconditional admission of a debt which a party is liable and is willing to pay. The most positive acknowledgment of a pre-existing debt is insufficient if accompanied by a declaration which is inconsistent with an intention to pay. (*McCormick v. Brown*, 36 Cal. 185; *Chabot v. Tucker*, 39 Cal. 437.) If the debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the debt when he is able, or by installments, etc., the creditor can claim nothing more than the promise gives him. (*Phelps v. Phelps*, 3 Hare, 281.)

We agree with the learned judge below. "The agreement to arbitrate does not contain any such an acknowl-

edgment of a pre-existing debt as will support a general implied promise to pay it. . . . When there is a written acknowledgment of a debt, not coupled with any promise, the law will imply a general promise to pay; but when the acknowledgment is accompanied by a particular promise, the law will imply none other. In such case, the acknowledgment is not direct and general, but qualified and conditional; and if it contains any cause of action, that cause must be based upon the contract which the instrument expressly states. In the case at bar, the acknowledgment contained in the recital in the first part of the written agreement to arbitrate is coupled with an express promise to do a particular thing, viz., to pay what the arbitrators shall award. The instrument contains no other promise to pay, express or implied. The recital which is claimed to be the acknowledgment is intended for the very purpose of explaining and pointing the particular promise which follows. It cannot, therefore, be construed to be a 'new or continuing contract' to pay upon a former obligation."

It is insisted, however, that here the acknowledgment was made before the statute had run upon the original oral contract; that the defendant had no power to attach any condition, and that we must disregard the express promise, and look at the acknowledgment alone.

It has been said that a promise made before the statute has run vitalizes the old debt for another statutory period, while an acknowledgment or promise made after statute has run gives a new cause of action, for which the old debt is the consideration. This distinction would seem, however, only to have affected the question of remedy. (Wood on Limitations, 81.) Mr. Wood says: "The plaintiff may in the latter case, but not in the former, declare upon the new promise; "but," he adds, "the practice in most of the states is to declare upon the old debt, and when the statute is pleaded to reply the new promise, and the issue is then upon the

plea and the replication, the replication to that extent being treated as a declaration upon the new promise. . . . It makes no difference in this respect that the promise is conditional. If the debtor does not perform the conditions agreed to by him, the creditor is remitted to his original remedy, and to a plea of the statute there-to, and he must rely upon the new promise; and if upon the plaintiff's part there is no fault as to the failure of conditions, the new promise becomes an absolute one upon the old debt." (Id.)

In this state, under the code, whenever the action is brought after the statute has run, the plaintiff can avoid a demurrer to his complaint only by averring the new promise. (*Chabot v. Tucker, supra.*) The declaration is always on the new promise.

Even if an unqualified promise made before the original cause of action was barred could be treated as merely modifying the original contract,—by extending the time of payment with reference to the statute of limitations,—a qualified and conditional promise, differing from the general promise to pay, must be held to be a distinct and substituted contract, and as the only contract in force after the original contract is barred. In an action brought on one promise a plaintiff cannot recover upon proof of another and different promise. The fact that the new contract was entered into before the original cause of action was barred cannot control nor change the terms or conditions of the new contract.

In the case at bar, the complaint alleged a new promise not proved.

If the proposed amendment had been inserted in the complaint, the complaint would then have been subject to demurrer, because the complaint would have shown that no valid award had been made by the arbitrators.

Section 337 of the Code of Civil Procedure was properly pleaded. Even if it should be conceded that the first subdivision of 339 should have been pleaded (and

not section 339 generally), the action, as we have seen, was not brought on the oral promise. This is also an answer to the suggestion that the running of the statute against the oral promise was suspended during the arbitration proceedings.

Order affirmed.

Ross, J., and MYRICK, J., concurred.

[No. 11493. Department One.—August 17, 1886.]

GEORGE LAWRENCE ET AL., APPELLANTS, *v.* WARREN GREEN ET AL., RESPONDENTS.

COMMON CARRIER — NEGLIGENCE — STAGE-COACH — BREAKING OF WHEEL — EVIDENCE. — The breaking of a wheel of a stage-coach is *prima facie* evidence that the wheel was defective, and in the absence of evidence showing that it was sound, or that the defect was latent, and could not be discovered by examination, is sufficient to establish the negligence of the carrier, and its liability for an injury to a passenger occasioned thereby.

ID. — BURDEN OF PROOF — DEFENDANT MUST REBUT PRIMA FACIE NEGLIGENCE. — In an action to recover for such an injury, after the plaintiff had shown that the accident was caused by the breaking of the wheel, the burden of proof was on the defendant to show that the wheel was not defective, or if so, that the defect did not cause the accident.

ID. — CONDUCT OF PERSON IN APPARENT DANGER. — A stage-coach proprietor is liable for an injury to a passenger caused by the negligent overturning of the coach, notwithstanding the passenger contributed to the injury by his own rashness, imprudence, or indiscretion at the time of the accident, if he did only what a person of ordinary prudence would probably have done under the same circumstances.

APPEAL from a judgment of the Superior Court of Sierra County.

The action was brought to recover damages for personal injuries alleged to have been caused by the overturning of a stage-coach. The further facts are stated in the opinion of the court.

Van Cleef & Wehe, for Appellants.

Hundley, Gale & Ford, for Respondents.

MCKINSTRY, J.—The complaint, after stating other facts, avers: “That whilst she, said Mary A. Lawrence, was said passenger and was being carried on said coach down the Goodyear Bar hill, between said Mountain House and Goodyear Bar, at a point on said road, . . . by and through the carelessness and negligence of the defendants [proprietors of the coach], said coach *broke down* and was overturned, by means whereof the said Mary A. Lawrence was greatly bruised and injured,” etc.

It was alleged in the answer that “said stage-coach had reached a point on said road a short distance above said Goodyear’s Bar, and while making a short and abrupt turn therein, said coach slid or lurched to the left, and the nigh or left hind wheel was dished or broken . . . That defendants do not own or have the control or any management of said road.”

The bill of exceptions shows that when the accident occurred the coach “was being driven down grade of a mountain road more than ordinarily steep, using the brake, and upon more than an ordinary curve therein to the left and toward the mountain, about four miles down said grade, wherein the track for the wheels on the left side of the road was about one foot lower than the track for the wheels on the right side thereof; but the condition of this part of the road when the accident happened had not been changed in any respect during the period of six months next before the time of the accident in question here, and during all of which period of six months the defendants had driven their coaches over it daily, except one day in each week, and had actual notice of its condition during that period and at the time of the accident; and D. P. Cole, one of the defendants, testified that for some time before the accident he had considered it a dangerous part of the road.”

The bill of exceptions does not show the pace or rapidity with which the horses were being driven. The evidence and the admission in the answer that the immediate cause of the overturn was the breaking of the wheel established *prima facie* that the wheel was defective. (*Christie v. Griggs*, 2 Camp. 79; *Dawson v. Manchester R. Co.*, 5 L. T., N. S., 682; Shearman & Redfield on Negligence, sec. 268, note.) There was no evidence that the breaking was caused by "heating," or that the defect in the wheel was *latent*, or that it had been examined without discovery of the defect.

The occurrence of an injury through a defect in the vehicle is at least *prima facie* evidence of negligence on the part of the carrier. (Shearman & Redfield on Negligence, sec. 268.) The carrier must have carriages adequate to the work to which they are subjected, and must see that they are kept in due repair. (Wharton on Negligence, secs. 628, 629.) But the carrier is not liable for damages incurred through latent defects which could not have been discovered by examination, and which are not traceable to any want of good business diligence in the manufacturer. (*Id.* 631.)

The negligence of the defendants was established *prima facie* by proof that the wheel broke, and the coach was thus overturned, and there was no evidence to overcome the *prima facie* case; no evidence that the wheel was sound, or that the defect was *latent*. As the case was presented, was the court authorized to charge the jury upon the hypothesis that the accident would have happened if there had been no defect in the wheel? The fact that the road was a foot lower on the inner side did not perhaps prove nor tend to prove that the wheel was a good wheel. It left the unsoundness of the wheel still uncontested, and simply showed that the unsound wheel broke when subjected to the strain or to the slide or lurch of the coach on the uneven ground. If the condition of the road was merely sufficient to create a suspicion that

a sound wheel might have been broken under the circumstances, the jury would not be justified in acting upon a mere surmise or conjecture of the existence of a possible fact of which there was no real evidence.

But even if it should be conceded that evidence that one side of the road was lower than the other, and that the coach lurched toward the lower side, tended to overcome the *prima facie* case of the plaintiff, it was for the defendants to overcome it.

The court charged the jury: "The defendants in this class of actions are not bound to prove just how the accident occurred; they must prove, however, by a preponderance of testimony, that it was not the result of their carelessness or ignorance."

The defendants were not bound to prove anything in the first instance. But when the plaintiff had shown *prima facie* that the accident was caused by the defective wheel, the burden was cast on the defendants to show that the wheel was not defective, or that the defective wheel did not cause the overthrow of the coach. It was for them to prove that the wheel was not in fact defective, or that the defect was latent, or at least that the cause was something entirely independent of the wheel, and one for which they were not responsible. In *Boyce v. Cal. Stage Co.*, 25 Cal. 468, the court said: "The fact that the coach did overturn is all that he [plaintiff] need establish in order to recover for such injuries as he may have sustained. In order to rebut this presumption of negligence, the defendant must show that the overturning was the result of inevitable casualty, for the law holds him responsible for the slightest negligence," etc. "In doing this, the defendant must necessarily explain how the overturning occurred, and if he fails to do this the presumption of negligence remains." (See also *Fairchild v. Cal. Stage Co.*, 13 Cal. 599.)

Here not only did the plaintiff prove the overturning of the coach, but the immediate cause of the overturning

is *admitted*. The defendants could not overcome the plaintiff's case, and show that the accident was not the result of their carelessness or negligence, except by proving how the accident did occur, and that it did not occur by reason of a defect in the wheel, or that such defect was latent. But the court's charge was, that defendants need not prove how it occurred, but assumed that, as against the plaintiff's case, they could show their irresponsibility in some other way.

The court below instructed the jury: "If you believe from the evidence that the plaintiff rashly or imprudently, and of her own fault, leaped from the stage-coach, and thereby caused or contributed toward the injury complained of, your verdict should be for the defendants." "When a party has been injured, and such injury was caused or contributed to by his own rashness, imprudence, or *indiscretion*, he is not entitled to recover damages for such injury. A coach proprietor is certainly not responsible for the rashness or imprudence of his passenger." "It is not sufficient to constitute contributory negligence that the plaintiff's own act contributed to her injury; but it must also appear that she so contributed by her own fault, or by neglecting to take ordinary care of her own personal safety."

A passenger ought not to be deemed guilty of contributory negligence when he takes such risk as *under the same circumstances* a prudent man would take. (Shearman & Redfield on Negligence, sec. 282.) And when the circumstances are such as would deprive a person of ordinary prudence of his self-possession, it is not to be expected that he will have all his mental faculties perfectly at his command. Speaking of the position of the plaintiff in *Robinson v. W. P. R. R. Co.*, 48 Cal. 421, the court said: "Startled and alarmed as she doubtless was by the imminent peril of her position, it would be asking more than should be required of an ordinarily prudent

and reasonable person to demand that she should exercise the soundest discretion in her efforts to escape."

If the case showed that the plaintiff encountered no danger from the overturning of the coach, and that an ordinarily prudent person must have known that there was no danger, but that she gave way to fright for which there was no real or apparent cause, it may be that her act in leaping from the coach would be held to be contributory negligence. The law, however, must select a standard by which to estimate the conduct of one in apparent danger, and selects as a standard the probable conduct of a person of ordinary prudence under the same circumstances. Applied to the facts of this case, the hypothesis concedes that the plaintiff was in some peril, and in such degree of peril that she may have acted in a manner which in the light of "the wisdom which comes after the fact" was not the wisest. The jury, unenvironed by the threatening circumstances which surrounded the plaintiff, may have believed that if she had remained in her place she would not have been seriously injured, or injured at all.

Would a person of ordinary prudence and courage have jumped from the coach? It may be claimed that this question was implied in the instructions given; that she was not guilty of a *fault* if she acted as a person of ordinary courage and prudence would have acted. The jury were told broadly that a coach proprietor is never responsible for the imprudence of his passengers. And they were also told in effect that if plaintiff was indiscreet, if she was not prudent, sagacious in adapting means to the end,—her personal safety,—if she was not circumspect and wisely cautious, she could not recover. The real question was, whether, assuming her to be ordinarily reasonable and prudent, the circumstances were so alarming as to deprive her in a degree of her ordinary reason and prudence, and to induce her instinctively to seek safety by an act which, although not

such as the jury might believe to be prudent or *discreet*, was such as the generality of persons would have adopted in the dilemma in which she was placed.

Judgment reversed and cause remanded.

Ross, J., and MYRICK, J., concurred.

Hearing in Bank denied.

[No. 11544. Department One.—August 23, 1886.]

A. G. PETERSON, APPELLANT, *v.* JOSEPH WEISSBEIN ET AL., RESPONDENTS.

EJECTMENT — VEXATIOUS ACTION — CROSS-COMPLAINT — INJUNCTION AGAINST PROSECUTION OF ACTION. — The action was brought to recover the possession of certain land. The answer denied the allegations of the complaint, and pleaded in bar of the action certain judgments rendered in other actions, which were alleged to have determined adversely to the plaintiff the title to the land in controversy. The defendants also filed a cross-complaint for an injunction restraining the plaintiff from asserting any title to the land, on the ground that his action was vexatious. During the pendency of the action, the defendants, upon affidavits and the judgment rolls in the actions pleaded in bar, moved for an order perpetually enjoining the plaintiff from further prosecuting the action. The court granted the motion. *Held*, that the order was erroneous.

APPEAL from an order of the Superior Court of Nevada County granting a perpetual stay of proceedings.

The facts are stated in the opinion of the court.

Cross & Simonds, and *E. H. Gaylord*, for Appellant.

A. Burrows, for Respondents.

Ross, J. The complaint in this case is in the usual form of complaints in an action of ejectment. To it the defendants filed an answer putting in issue its averments, and also pleading in bar of the action judgments in certain other actions, which it is claimed determined adversely to the plaintiff the title to the property in con-

troversy. The defendants also filed a cross-complaint, by means of which they sought to have the plaintiff perpetually enjoined from asserting any right to the property, on the ground that his action was vexatious, to which cross-complaint the plaintiff filed a demurrer. Subsequently, and during the pendency of the demurrer, defendants moved the court, upon affidavits and the judgment rolls in the suits pleaded in bar, for an order perpetually enjoining the plaintiff from further prosecuting the action. The motion was granted, and the action of the court in that particular constitutes the ground of the present appeal.

It is not necessary in this case to determine whether under any circumstances it is competent to try upon affidavits the question whether or not the title claimed by plaintiff in an action of ejectment is the same title adjudicated against him in some other action, nor to determine the sufficiency of the cross-complaint in the present case to obtain the relief sought thereby. It is enough to say that defendants could not anticipate the result of the proceedings under the cross-complaint by the motion in question.

Order reversed, and cause remanded for further proceedings.

MYRICK, J., and MCKINSTRY, J., concurred.

Hearing in Bank denied.

[No. 11301. Department One.—August 23, 1886.]

A. J. SMITH ET AL., RESPONDENTS, v. JAMES B. FURNISH ET AL., EXECUTORS, ETC., OF WILLIAM HICKS, DECEASED, APPELLANTS.

ESTATE OF DECEDENT — SERVICES OF MARRIED WOMAN — CLAIM FOR — PRESENTATION OF — JUDGMENT. — A claim against the estate of a deceased person for services rendered by a married woman while living with her husband is community property, and should

be presented to the personal representatives of the decedent in the name of the husband. But where such a claim, verified by the wife, is presented in her name by the husband, and is rejected, and an action is subsequently brought thereon by the husband and wife, a judgment in favor of the plaintiffs will not be reversed on account of the informality in the manner of the presentation.

ID. — BEQUEST IN PAYMENT OF SERVICES — RENUNCIATION OF BY LEGATEE — ELECTION. — The action was brought to recover the value of services rendered by one of the plaintiffs as nurse to a deceased person. The decedent by his will bequeathed to the plaintiff a sum of money in consideration and in payment for the care and attention of the plaintiff during his last sickness. *Held*, that the action was a renunciation of the bequest, and an election by the plaintiff not to rely upon it as a payment for the services.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

W. H. Beatty, and S. C. Denson, for Appellants.

Grove L. Johnson, for Respondents.

Ross, J. — The plaintiff, Emma L. Smith, and her co-plaintiff, A. J. Smith, are husband and wife, and as such resided together in the house of the deceased, William Hicks, during which time Mrs. Smith rendered Hicks services as nurse, for the value of which this suit was brought. It is contended on behalf of the appellants that the claim for the services was not properly presented to the executors of the estate of Hicks. It was verified by Mrs. Smith, and presented in her name by her husband to the executors, and by them rejected. They claim that it should have been verified by the husband, and presented in his name; that the debt due by Hicks was due to A. J. Smith, and that it is indispensable to an action upon it that a claim for the amount should have been duly presented to the executors in *his* name. It does not admit of doubt, we think, that the amount due for the services rendered constituted com-

munity property. It is provided by section 162 of the Civil Code that "all property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property." And by the next section that "all property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." By section 164 it is declared that "all other property acquired after marriage, by either husband or wife, or both, is community property."

An exception to this last general provision is made in favor of the earnings and accumulations of the wife while she is living separate from her husband, by virtue of section 169 of the Civil Code, which reads: "The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife." It would be clearly contrary to these provisions of the code to hold that *all* earnings and accumulations of the wife are her separate property. The exception cannot be extended by the courts beyond its fair scope. The provision that the earnings and accumulations of the wife, *while she is living separate from her husband*, are her separate property plainly assumes that such earnings and accumulations as are not so acquired do not constitute the separate property of the wife, but are embraced by the general provisions of section 164, and constitute community property. It is true that by section 168 of the same code it is provided that "the earnings of the wife are not liable for the debts of the husband"; but what should be considered earnings of the wife and what debts of the husband within the true meaning of that section are questions that do not arise in this case.

The debt due from the deceased, Hicks, for the services

rendered him by Mrs. Smith, being the community property of Mr. and Mrs. Smith, was there such a presentation of the claim for the amount to the executors of the estate of Hicks as would authorize a suit upon its rejection?

As has been seen, it was verified by the wife, and presented in her name by the husband. That the claim was sworn to by the person best acquainted with the facts surely cannot be good ground of objection to its verification. Undoubtedly, it ought to have been presented in the name of the husband, since the amount due constituted community property, but it was presented by the husband in the name of his wife. Had the claim been allowed by the executors, he would have been estopped from presenting another claim in his own name for the same services; and having with his wife brought this suit upon the rejected claim, a recovery thereon would equally estop him. A claim for the services, properly verified, was presented to the executors, who rejected it, but without objection to the manner of its presentation. Suit having been brought thereon, plaintiffs proved the rendition of the services and their value, and recovered judgment. Ought the judgment to be reversed only because the claim was presented to the executors by the husband in his wife's name instead of his own? Under the circumstances of the case, we think not. The substantial rights of the estate have not been affected by the manner of its presentation, and we do not think a just judgment against it ought to be reversed on that ground.

The only other point relied on by the appellants for a reversal grows out of the fact that the deceased in his will made a bequest to Mrs. Smith of three thousand dollars, "in consideration and in payment for her kind care and attention during my last sickness." It is said that the bequest was intended as full compensation for the services rendered by Mrs. Smith, and that it has not been renounced. The answer to this is, that her action in re-

spect to the claim was an election on her part not to rely upon the bequest; and upon the distribution of the estate, the rights of the executors, and of all interested therein, can be properly and appropriately protected.

Judgment and order affirmed.

MYRICK, J., and MCKINSTRY, J., concurred.

Hearing in Bank denied.

[No. 20170. In Bank. — August 24, 1886.]

THE PEOPLE, RESPONDENT, *v.* MAUD MANNERS,
APPELLANT.

CRIMINAL LAW — GRAND LARCENY — VERDICT. — In a prosecution for grand larceny, a verdict finding the defendant "guilty as charged" is sufficient.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Henry T. Gage, for Appellant.

Attorney-General Marshall, for Respondent.

MORRISON, C. J. — The defendant was charged by information, prosecuted, and convicted of the crime of grand larceny, the charge being that she feloniously took and carried away four twenty-dollar gold pieces, the same being the property of the prosecuting witness. On the trial, the court charged the jury that the form of the verdict should be, if they found the defendant guilty, as follows: "We, the jury, find the defendant guilty as charged." The jury did find the defendant "guilty as charged," and this presents the only point in the case on appeal.

The question is not a new one in this court. In the case of *People v. Whitely*, 64 Cal. 211, this court, sitting in Bank, held such a verdict good, and affirmed the judgment. In the more recent case of *People v. Price*, 67 Cal. 350, the case of *People v. Whitely, supra*, was cited with approbation by the entire court. These cases leave the question no longer open in this court, and following the same, we must affirm the proceedings in the court below.

Judgment and order affirmed.

Ross, J., THORNTON, J., SHARPSTEIN, J., MCKINSTRY, J., and MCKEE, J., concurred.

Rehearing denied.

[No. 11318. Department One.—August 25, 1886.]

OLIVER SANDERS, RESPONDENT, *v.* MARY LANSING, APPELLANT.

CONTRACT FOR SALE OF LAND — PAYMENT OF PURCHASE PRICE — FAILURE OF TITLE. — Money paid by the vendee as part of the purchase price under a contract for the sale of land may be recovered if the vendor did not have the title at the time the contract was made, nor acquire it afterwards.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

T. J. Clunie, and McKune & George, for Appellant.

Freeman, Johnson & Bates, for Respondent.

MYRICK, J.—The defendant agreed with plaintiff to sell to him a tract of land at a stipulated price per acre, possession to be given on full payment. Plaintiff paid five thousand two hundred dollars, part of the purchase price. Defendant having failed to convey, this action

was brought to recover the money paid. At the time of making the contract, defendant was not in condition to give title, the title being in other parties, nor has she since acquired the title. The defendant can give neither title nor possession. Under such circumstances, the plaintiff is entitled to recover the money paid.

Judgment and order affirmed.

Ross, J., and McKinstry, J., concurred.

[No. 11056. Department One.—August 25, 1886.]

J. F. HICKEN, RESPONDENT, *v.* JAMES FRENCH,
APPELLANT.

SCHOOL LANDS — ACT OF APRIL 26, 1858 — EXCESSIVE SALE — CERTIFICATE OF PURCHASE. — Under the act of April 26, 1858, except in certain cases specified therein, a sale of school lands to one person containing more than 160 acres is void, and a certificate of purchase therefor issued by the sheriff conveys no title.

APPEAL from a judgment of the Superior Court of Placer County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Jo Hamilton, for Appellant.

L. S. Taylor, and *W. C. Norton*, for Respondent.

MYRICK, J.—A contest arose in the office of the surveyor-general of this state between plaintiff and defendant as to their respective right to certain school lands, and the surveyor-general made an order referring the contest to the Superior Court of the proper county. In pursuance of that order, this action was brought.

It appears from the findings that in 1860, under section 9 of the act of April 26, 1858 (Stats. 1858, p. 318), a certificate of sale was issued by the sheriff to one Higgins for 320 acres, as purchased by him.

It also appeared that for the year 1876-77 the land was assessed for state and county taxes, which taxes being unpaid, the land was sold therefor to the defendant, French. This sale and the tax deed executed thereon constitute the only right or title of defendant. The court found that Higgins never paid the state anything for the land, and that the state never enforced any lien for the purchase-money; that the defendant, French, was never an actual settler on the land, and that the same had been open and uninclosed and entirely unimproved until the entry of plaintiff in 1883.

The act above referred to declared (last clause of section 1) that lands should be sold in lots not less than 40 nor more than 160 acres, except in certain specified cases. The alleged purchase by Higgins was not within the exceptions. The sheriff had no authority to issue a certificate for the purchase by one person at one sale of a lot containing more than 160 acres. As the certificate was of a sale in one lot of more than that amount, the sale was void, and no title passed; and it follows that Higgins had no taxable interest, and French acquired no right or title by virtue of the tax sale.

Judgment and order affirmed.

MCKINSTRY, J., and ROSS, J., concurred.

[No. 11190. Department Two.—August 25, 1886.]

COUNTY OF YOLO, RESPONDENT, *v.* EDWARD KNIGHT ET AL. EDWARD KNIGHT, APPELLANT.

SUMMONS — PUBLICATION — AFFIDAVIT FOR — STATEMENT OF FACTS IN — JURISDICTION — JUDGMENT. — Under section 412 of the Code of Civil Procedure, an affidavit for the publication of summons against a non-resident defendant, in a case where the complaint is unverified, must state the facts showing the existence of a cause of action against the defendant, and that he is a necessary or proper party to the action; otherwise the court does not acquire

jurisdiction of the defendant by reason of the attempted service by publication, and a judgment by default founded thereon is void.

ID. — STATEMENT OF LEGAL CONCLUSION INSUFFICIENT. — In such a case, an affidavit which merely states that the plaintiff has a good cause of action against the defendant, and that he is a necessary and proper party defendant, is insufficient.

ID. — ACTION TO CONDEMN LAND — PUBLIC HIGHWAY — PROCEEDINGS BEFORE SUPERVISORS. — In an action to condemn land for a public highway, an affidavit for the publication of summons, where the complaint is unverified, must show that the proceedings before the board of supervisors have been had as provided in sections 2698 to 2708 of the Political Code.

ID. — APPEAL FROM JUDGMENT — RECITALS IN FINDINGS — DEFENDANT NOT CONCLUDED BY. — On an appeal from a judgment by default, rendered after an insufficient service of summons by publication, the defendant is not concluded by a recital in the findings that due proof had been made that the summons was legally served upon him, and his time for answering had expired.

ID. — PROOF OF SERVICE — CERTIFICATE OF NOTARY PUBLIC. — The service of a summons and complaint by a notary public must be proved by his affidavit; his mere certificate is insufficient.

APPEAL from a judgment of the Superior Court of Yolo County.

The facts are stated in the opinion.

W. B. Treadwell, for Appellant.

J. Craig, and *J. C. Ball*, for Respondent.

BELCHER, C. C. — This is an appeal from a judgment by default condemning certain land owned by the defendant, for the purposes of a public highway.

Only one question need be considered, and that relates to the jurisdiction of the court to enter the judgment.

When the complaint was filed the defendant was in England. A summons was issued, and returned by the sheriff, with his certificate that he had been unable to find the defendant in Yolo County. Thereupon the attorney for plaintiff made an affidavit, and upon it asked and obtained an order for the publication of the summons. The affidavit stated that the complaint had been filed, and a summons issued thereon; that the ac-

tion was brought for the purpose of acquiring the right of way for a public road and highway across and over the lands of the defendant; that the defendant was then residing at Sleaford, Lincolnshire, England; and then proceeded as follows:—

“That affiant is the attorney of record for said plaintiff, and is familiar with and knows the facts in this case; that the defendant E. Knight is the owner in fee of the lands sought to be taken in this action; that the plaintiff has a good cause of action in this suit against the said defendant, and that the said defendant, E. Knight is a necessary and proper party defendant thereto.”

The order directed the publication of the summons for the requisite time, and it was published accordingly. It also directed that a copy of the summons and complaint be forthwith deposited in the post-office, postpaid; directed to the defendant at his said place of residence; and this was done.

Was this affidavit sufficient to authorize the court or judge to make the order? If not, then there was a want of jurisdiction, and the order and publication were void.

The code provides that “where the person on whom the service is to be made resides out of the state, . . . and the fact appears by affidavit to the satisfaction of the court or a judge thereof, and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may make an order,” etc. (Code Civ. Proc., sec. 412.)

In *Ricketson v. Richardson*, 26 Cal. 153, the court, speaking of the corresponding sections of the old practice act, says: “An affidavit which merely repeats the language or substance of the statute is not sufficient. Unavoidably the statute cannot go into details, but is compelled to content itself with a statement of the ultimate facts, which must be made to appear, leaving the

detail to be supplied by the affidavit from the facts and circumstances of the particular case. Between the statute and the affidavit there is a relation which is analogous to that existing between a pleading and the evidence which supports it. The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the *special office* of the affidavit. To illustrate: it is not sufficient to state generally that after due diligence the defendant cannot be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence, or the fact showing that he is a necessary party, shall be stated. To hold that a bald repetition of the statute is sufficient is to strip the court or judge to whom the application is made of all judicial functions, and allow the party himself to determine in his own way the existence of jurisdictional facts,—a practice too dangerous to the rights of defendants to admit of judicial sanction. The ultimate facts stated in the statute are to be found, so to speak, by the court or judge from the probatory facts stated in the affidavit before the order for publication can be legally entered."

And in *Forbes v. Hyde*, 31 Cal. 352, the court, speaking upon the same subject, says: "The statute provides that 'when the person on whom service is to be made resides out of the state, and the facts shall appear by affidavit, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order,' etc. The existence of a cause of action, etc., then, is also a jurisdictional fact which must appear '*in like manner*,' that is to say, by *affidavit*. The statute as clearly makes a cause of action as non-

residence a jurisdictional fact, and we can no more disregard the one than the other. If this fact does not appear by the affidavit upon which the order for publication was founded, then there was a want of jurisdiction, and the order and publication are void."

In this case, no facts are stated in the affidavit showing that the plaintiff had a cause of action against the defendant. It is true, it is stated that the action was brought for the purpose of acquiring the right of way for a road over land owned by the defendant; but before such an action can be brought, certain proceedings must be had before the board of supervisors, as provided in sections 2698 to 2708 of the Political Code.

These proceedings are conditions precedent to the right to maintain the action, and must be stated in the complaint and affidavit, or no cause of action is shown.

The statement in the affidavit that the plaintiff has a good cause of action against the defendant, and that the defendant is a necessary and proper party thereto, is a statement of opinion or belief, and not of facts. Unless a cause of action is stated, there can be no necessary or proper party thereto. There must be an existing cause of action against some one before any question of parties can arise. The rule is stated in *Ricketson v. Richardson, supra*, as follows: "It must appear from the affidavit . . . that the plaintiff has a cause of action against him (the defendant), or that he has a cause of action to the complete determination of which he is a necessary or proper party."

Under the section of the code before quoted, it may be made to appear by the affidavit, or by the verified complaint on file, that a cause of action exists against the defendant. Here the complaint was not verified, and so the plaintiff is not aided by that.

The findings of the court recite that due proof had been made that the summons in the case had been legally served upon the defendant, and his time for answering

had expired. But these recitals cannot aid the plaintiff. "In order to maintain a judgment when it is directly attacked, as in this case, by an appeal, it is requisite that the record should show that the court had jurisdiction of the person against whom the judgment was rendered, and that the judgment was warranted by the allegations of the pleadings of the party in whose favor it was rendered. We refer only to the judgments on the merits. In determining that question, recitals which may be found in the judgment cannot be regarded, for the question is, whether the record sustains the judgment. Such recitals, therefore, will not be accepted as a substitute for the summons and the proof of service." (*McKinlay v. Tuttle*, 42 Cal. 577.)

The record contains a certificate made by one Crosfield, a notary public, "duly authorized, admitted, and sworn," and attested by his official seal, that at a time after the order of publication was made, he personally served the defendant at Sleaford, in the county of Lincoln, in England, with a copy of the summons and complaint in the action. To this certificate is attached a certificate by a vice-consul of the United States that "the signature subscribed and seal affixed to the notarial act hereunto annexed are the handwriting and official seal of Hy. C. Crosfield, a notary public of England, and that to the said act full faith and credit are due."

The code provides (Code Civ. Proc., sec. 412): "Proof of the service of summons and complaint must be as follows:—

- "1. If served by the sheriff, his certificate thereof;
- "2. If by any other person, his affidavit thereof."

As the attempted service in England is not shown by affidavit, it must be disregarded.

It follows that the judgment should be reversed and the cause remanded.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, judgment reversed and cause remanded.

Hearing in Bank denied.

[No. 11450. Department Two.—August 25, 1886.]

W. R. WIGGINS, APPELLANT, *v.* MATTHEW BRIDGE
ET AL., RESPONDENTS.

LIEN OF MATERIAL-MAN — ABANDONMENT OF BUILDING BY CONTRACTOR — COMPLETION BY OWNER — PAYMENT OF CONTRACTOR.—Where a contractor for the erection of a building abandons the work before its completion, after being paid in full by the owner for the work already done, a material-man is not entitled to a lien on the building for materials furnished the contractor for its construction, unless the owner afterwards completes it for a less amount than the balance of the contract price.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

Gardiner & Stephenson, and *Paris & Goodcell*, for Appellant.

Albert M. Stephens, for Respondents.

McKEE, J.—This is an appeal from a judgment in an action to foreclose a mechanic's lien.

The judgment was rendered upon a finding which shows that on the 5th of July, 1883, two of the defendants—Bridge, as an original contractor, and Phillips, as tenant of the Southern Pacific Railroad Company, in possession of the land described in the pleadings—entered into a building contract whereby Bridge agreed to construct upon the land a brick house according to certain plans and specifications, which he was to complete within fifty working days from the date of the contract, of forfeit ten dollars a day for every day beyond the

stipulated time, for which Phillips agreed to pay him \$6,070, in part as work upon the building progressed, and in full upon performance of the work according to contract.

The contractor commenced to work. During its progress, the plaintiff sold and delivered to him for the work materials which were used in the building. The contractor failed to pay for them, and on the 8th of September, 1883, the plaintiff filed a claim of lien against the building.

It is alleged that at the time of filing the claim "there was due and unpaid to the contractor, as part of the contract price for the construction of the building, the sum of six hundred dollars"; and that "the building was completed on or about the 15th of September, 1883." These allegations were denied, and upon the issues raised by the denial the court finds that from time to time, as the work upon the building progressed, the owner of the building, without any notice of the claim of the plaintiff, paid to the contractor, and to the material-men and workmen on his orders, the sum of \$5,283 for the work which had been done under the contract; that the work itself had been done in an unworkmanlike manner, and the contractor, after receiving payment for what had been done, failed and refused to finish the work. So that he did not complete the building on the 15th of September, 1883, according to the contract, or at all, in consequence of which, and of the unworkmanlike manner of the work which he performed, the owner sustained two thousand dollars damages; and at the time of the filing of the claim by the plaintiff, "there was not due or unpaid from the defendant Phillips to defendant Bridge, as part of the contract price, or at all, for the construction of said building, the sum of six hundred dollars, or any sum whatever."

Such being the fact, no lien in favor of the plaintiff attached to the building under the provisions of the

mechanics' lien law. As was said in *Blythe v. Poultney*, 31 Cal. 234, the right of a material-man to a lien on the land and building, as against the owner, for materials furnished the contractor, depends for its existence upon the fact of an indebtedness from the owner to the contractor at the time of or subsequent to the notice. (See also *Dore v. Sellers*, 27 Cal. 595; *Dingley v. Greene*, 54 Cal. 597; *Whittier v. Hollister*, 64 Cal. 283; *Rosenkranz v. Wagner*, 62 Cal. 151; *O'Donnell v. Kramer*, 65 Cal. 153; *Latson v. Nelson*, 11 Pac. C. L. J. 589; *Turner v. Strenzel*, 11 Pac. L. R. 389.)

Assuming, therefore, as the court finds, that when the plaintiff gave notice of his claim of lien upon the building there was nothing due and owing to the contractor upon the contract, as the contractor did not afterwards contribute anything to the construction of the building, and never completed it, he was not entitled to recover upon it; and under the lien law, a subcontractor or material-man is not entitled to enforce a lien against the building unless after the owner has completed the building there remains a balance of the contract price, which may be applied to the satisfaction of such a claim. But there is no finding, and we must presume there was no evidence, as there is no allegation in the complaint, that the owner of the building had the building completed for a less sum than what remained of the contract price after the contractor abandoned the work.

Judgment affirmed.

SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 11252. Department Two.—August 25, 1886.]

JOHN AMER, APPELLANT, *v.* R. F. HIGHTOWER
ET AL., RESPONDENTS.

FRAUDULENT SALE — OWNERSHIP DOES NOT PASS TO VENDEE — REMEDIES OF SELLER. — Where a sale of personal property is procured by fraud, the ownership of the property is not changed, unless the seller in some way afterwards ratifies the sale; and in the absence of a ratification, the seller may maintain an action to recover possession of the property or damages for its conversion.

APPEAL from a judgment of the Superior Court of Stanislaus County, and from an order refusing a new trial.

The facts are stated in the opinion.

Hatton & Fulkerth, and W. E. Turner, for Appellant.

The sale being fraudulent, no title passed to the purchaser, and the seller was entitled to maintain an action to recover the possession of the property. (*Allison v. Matthieu*, 3 Johns. 235; *Van Cleef v. Fleet*, 15 Johns. 147; *Andrew v. Dictrich*, 14 Wend. 31; *Mowrey v. Walsh*, 8 Cow. 238; *Tamplin v. Addy*, 8 Cow. 239; *Butler v. Collins*, 12 Cal. 461; *Abbott v. Barry*, 5 Moore, 98; *Buffington v. Gerrish*, 15 Mass. 156; *Lupin v. Marie*, 2 Paige, 169; *Badger v. Phinney*, 15 Mass. 364; *Irving v. Motley*, 7 Bing. 543; *Root v. French*, 13 Wend. 570.)

Wright & Hazen, L. W. Elliott, and Reddick & Solinsky, for Respondents.

The recitals of the bill of sale are conclusive, and cannot be assailed so as to show that no title passed. (Code Civ. Proc., sec. 1963; *Rhine v. Ellen*, 36 Cal. 369; *Coles v. Soulsby*, 21 Cal. 47; *Hendrick v. Crowley*, 31 Cal. 471.) The bill of sale cannot be attacked for fraud without an allegation thereof. (*Kent v. Snyder*, 30 Cal. 667; *Capuro v. Builders' Ins. Co.*, 39 Cal. 124; *Somes v. Brewer*, 2 Pick. 201; *Stevens v. Hyde*, 32 Barb. 177.)

BELCHER, C. C.—This is an action to recover the possession of certain personal property, or its value in case a delivery cannot be had, and damages for its detention. The answers deny all the allegations in the complaint.

At the trial, the plaintiff was called as a witness, and testified in his own behalf. He was then asked, on cross-examination, if he had ever made a bill of sale of the property described in the complaint, and answered that he had. The bill of sale was shown to him, and he said "he signed it, but it was got out of him by lying." The bill of sale was then offered by the defendants, and received in evidence, the material parts of it reading as follows:—

"In consideration of the sum of \$2,055 to me in hand paid by R. F. Hightower, I do hereby sell and deliver to him," etc. (describing property).

"In witness whereof I have hereunto set my hand this eighteenth day of September, 1884. JOHN AMER."

On redirect examination, the witness was asked to state all the circumstances under which he gave the bill of sale.

Counsel for defendants objected to the question, upon the ground that it was incompetent, irrelevant, and immaterial under the pleadings; that no fraud having been alleged in the complaint, and this being an action at law, the plaintiff was bound by the wording and language of the bill of sale, and could not vary, alter, or modify it by parol testimony.

Counsel for plaintiff then offered to prove by this witness and others that the bill of sale was obtained from plaintiff by fraud, falsehood, and deceit on the part of Hightower and others; that no consideration had been paid for it; that he had never delivered the property, or any part of it, to Hightower, or any one else; that after discovering the fraud practiced upon him, he immediately demanded that the bill of sale be returned to him, and refused to deliver the property; that Hightower

promised to return the bill of sale, but failed to do so, and that he took the property from plaintiff's possession without his knowledge or consent; and that the other defendants were at all times fully aware and cognizant of all the facts of fraud and deceit under which the bill of sale and possession of the property were obtained by Hightower.

The court sustained the objection, and refused to allow any such testimony in the case, and the plaintiff duly excepted.

Thereupon both parties rested, and the court instructed the jury to return a verdict for the defendants.

The plaintiff appeals from the judgment, and from an order denying him a new trial.

Several points are made by the appellant, but the only material one relates to the rulings of the court upon the offered testimony. Those rulings were based upon that part of section 1962 of the Code of Civil Procedure which reads as follows:—

“The following presumptions, and no others, are deemed conclusive:—

“2. The truth of the facts recited from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration.”

It is claimed for the respondents that under this section the recital in the bill of sale that the plaintiff does “hereby sell and deliver” to the defendant the property is conclusive upon him, and not subject to be disputed except by a suit in equity to set aside the bill of sale.

In our opinion, the claim is not supported by reason or authority. The rule is well settled that when a sale of personal property is procured by fraud the ownership of the property is not changed, unless the seller in some way afterwards ratifies the sale. In *Ash v. Retnam*, 1 Hill, 303, Judge Cowen state the rule as follows:—

"When a sale is procured by fraud, no title passes to the vendee; the vendor still retains his right in the goods, unless after discovering the fraud he assented to and ratified the act of sale positively, or by such delay in reclaiming the goods as would authorize a jury to infer assent"; and he cites *Root v. French*, 13 Wend. 570; S. C., 28 Am. Dec. 428.

The same doctrine is reasserted in *Cary v. Hotailing*, 1 Hill, 311, S. C., 37 Am. Dec. 323, and in *Olmsted v. Hotailing*, 1 Hill, 317.

In *Mason v. Bovet*, 1 Denio, 73, Judge Beardsley says: "Fraud destroys the contract *ab initio*, and the fraudulent purchaser has no title"; citing Chitty on Contracts, Am. ed. of 1842, 406, 678-681. See also *Hodgeden v. Hubbard*, 18 Vt. 504; S. C., 46 Am Dec. 167.

In *Thurston v. Blanchard*, 22 Pick. 18, S. C., 33 Am. Dec. 700, Shaw, C. J., held that "if a purchase of goods is effected by means of fraudulent representations on the part of the vendee, the vendor may maintain trover for the goods against the vendee without a previous demand."

In Benjamin on Sales, 2d ed., 342, speaking of a sale which the vendor has been fraudulently induced to make, it is said: "This contract is *voidable* at the election of the vendor, not void *ab initio*. It follows, therefore, that the vendor may affirm and enforce it, or may rescind it. He may sue in *assumpsit* for the price, and this affirms the contract, or he may sue in trover for the goods or their value, and this disaffirms it."

In *Butler v. Collins*, 12 Cal. 457, which was an action to recover damages of the defendant as for a trespass and conversion of goods, this court reviewed the authorities, and announced the law to be that "the ownership of goods is not changed when the claim to such ownership is based upon a fraudulent contract."

It was held that when the defendant, in tending to deceive the plaintiff, got from him a bill of sale for goods

under the representation that it was only to serve as a temporary security for the compliance by the plaintiff with an engagement to furnish certain securities on previous indebtedness, and *at this time* intended to refuse to receive such security, or give plaintiff the advantage of such new contract, the possession of the goods thus obtained was fraudulent, and the bill of sale void. "It is as much a trespass," the court said, "to take possession under such circumstances as without color of contract."

And it was further said: "This being so, the civil remedies of the party defrauded are clear; viz., trover or replevin in the *detinet*, or trespass or replevin in the *cepit*, at his election."

The testimony offered and rejected was to the effect that the bill of sale and the possession of the property were obtained from the plaintiff by fraud and misrepresentations, and that as soon as he discovered the fraud he repudiated and rescinded the sale. This was competent testimony, and should have been received. The rule above stated has not been changed by the code. Fraud vitiates a sale now as it did before the codes were passed. Nor have the remedies been changed.

It follows that the section of the Code of Civil Procedure upon the supposed authority of which the rulings were made has no application to the case, and the judgment and order should therefore be reversed, and the cause remanded for a new trial.

SEARLS, C., and FOOTE, C., concurred.

THE COURT. — For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded for a new trial.

[No. 11355. Department Two.—August 26, 1886.]

ALONZO JOY, RESPONDENT, v. JOHN MCKAY, APPELLANT, AND JOHN MCKAY, ET AL., INTERVENORS AND APPELLANTS.

TENANCY AT SUFFERANCE OR AT WILL — TERMINATION OF — DEATH OF LANDLORD — EJECTMENT BY HEIR — NOTICE TO QUIT — DEMAND. — The death of the landlord terminates a tenancy at sufferance or at will, and thereafter the possession of the tenant is wrongful as against his heirs, who become vested with a right of entry, and may maintain ejectment without previously serving a notice to quit, or demanding possession of the tenant.

EJECTMENT — GENERAL VERDICT — CONFLICT OF EVIDENCE. — In an action of ejectment, a general verdict is sufficient, and will not be disturbed on the ground of the insufficiency of the evidence, if the evidence is substantially conflicting.

APPEAL from an order of the Superior Court of Amador County refusing a new trial.

The facts are stated in the opinion of the court.

A. C. Brown, for Appellants.

Eagon & Armstrong, for Respondent.

MCKEE, J. — This is an action to recover possession of certain land and premises in Amador County, of which Jarius A. Joy died seised and possessed on the 14th of January, 1883. Plaintiff in the action is the sole heir and distributee of the estate of said decedent.

The action was commenced on the 17th of January, 1884. At the commencement of the action, the defendants, John McKay and his wife, were in possession, claiming their possession to be rightful, because of, — 1. A permissive occupancy of the premises under Jarius A. Joy in his lifetime; and 2. Of a deed from him to his sister, the defendant and intervenor, Clara A. McKay, the wife of the defendant John.

At the trial, evidence was given tending to show that in the year 1881, Joy, being owner and in possession of

the land, entered into a verbal agreement with McKay, his brother-in-law, to farm the land together for their mutual benefit; and that under that arrangement McKay entered upon the land and farmed it with Joy until the latter died in 1883.

After Joy's death McKay continued to occupy and farm the land for his own benefit; neither the administrator of Joy's estate, nor the plaintiff as the heir and distributee thereof, demanded possession from him; and it is contended that the plaintiff is not entitled to recover possession without proof of a demand.

But the defendant had not entered into possession under any agreement to pay rent; he was therefore not in possession as a tenant from year to year, entitled to notice to quit under section 1162 of the Code of Civil Procedure, and if the legal relation between him and Joy in the lifetime of the latter had been that of a tenant at sufferance or a tenant at will, that relation was terminated by the death of Joy; thereafter it ceased to exist, and the possession of the defendant became wrongful against the plaintiff, who as the sole heir and distributee of the estate of the original owner became vested with the right of entry to the land. No notice to quit nor any demand of possession was necessary on the part of the plaintiff before bringing an action of ejectment. (*Kilburn v. Ritchie*, 2 Cal. 145; S. C., 56 Am. Dec. 326; *Hauxhorst v. Lobree*, cr Cal. 145; S. C., 56 Am. Dec. 326; *Hauxhorst v. Lobree*, 38 Cal. 563; *McCarthy v. Yale*, 39 Cal. 585; *Martin v. Splivalo*, 56 Cal. 128; Civ. Code, sec. 793.)

The wife of the defendant derived no right or title to the land by the instrument in writing under which she asserted title.

The instrument purported to have been executed on the 22d of May, 1876. Its execution was not attested by any subscribing witness,—Joy, the party alleged to have executed it, was dead. In proof of its execution, Mrs. McKay testified that her brother delivered the instrument to her at the time it bears date, and told her

he "would acknowledge it when convenient"; but he died without acknowledging it, and the deed when offered in evidence was attacked as a forgery. Upon that issue there was a substantial conflict in the evidence, and the jury that tried the case rendered a general verdict for the plaintiff.

In ejectment, a general verdict is sufficient (*Cummings v. Peters*, 56 Cal. 597.) and it will not be disturbed when founded upon substantially conflicting evidence.

Judgment and order affirmed.

SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 11400. Department Two.—August 26, 1886.]

MARION BIGGS, RESPONDENT, *v.* CHARLES R. LLOYD ET AL. CHARLES R. LLOYD, APPELLANT.

JURY TRIAL — RIGHT TO WHEN NOT WAIVED — FAILURES TO DEMAND — RULE OF COURT. — The right to a jury trial is not waived by neglecting to demand a jury at the time the case is called to be set for trial, notwithstanding a rule of court that a jury shall then be demanded.

APPEAL from a judgment of the Superior Court of Butte County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

W. S. Goodfellow, and *R. C. Long*, for Appellant.

Gray & Sexton, and *Hundley & Gale*, for Respondent.

McKEE, J.—This is an appeal from a judgment and an order denying a new trial in an action arising on contract.

When the case was called for trial on the 16th of April, 1885, the day for which it had been set for trial, defendants demanded a jury, but the court refused to grant the demand, and proceeded, against the objections and ex-

ception of the defendants, to hear and determine the case without a jury. The refusal was made on the ground that the defendants had waived a jury trial by not demanding a jury in the mode prescribed by the rules of the court. The rules of the court were as follows:—

“The first Monday in every month shall be termed ‘law day.’”

“And if a jury is desired, it shall be demanded on the law day when the case is set for trial.”

The rules of the court also provided, “a jury shall be drawn for the Monday succeeding law day. All cases for trial by jury shall be tried before drawn juries.”

The law day of the court for April, 1885, occurred on Monday, the 6th of April. On that day the cause was regularly called to be set for trial, and it was set down for the 16th of April at the hour of ten o'clock, A. M. The defendants did not then demand a jury, and the court did not draw or order a jury to be drawn for the trial of the cause.

Did the failure by defendants to demand a jury on the law day constitute a waiver of their right to a trial jury on the day for which the cause was set for trial? We think not. For the court had no power to declare by its rules what shall constitute a waiver of a constitutional right; and the rules themselves do not declare that the failure to demand a jury in a case upon the calling of the case on the law day to be set for trial shall amount to a waiver.

The constitution ordains: “A trial by jury may be waived . . . in civil actions by the consent of the parties, signified in such manner as may be prescribed by law.” (Const., art. 1, sec. 7.) Section 631 of the Code of Civil Procedure declares:—

“Trial by jury may be waived by the several parties to an issue of fact arising on contract, or for the recovery of specific, real, or personal property, with or without damages, and with the assent of the court in other actions,

in manner following: 1. By failing to appear at the trial; 2. By written consent in person, or by attorney, filed with the clerk; 3. By oral consent in open court, entered in the minutes."

These are the only ways in which the right to a jury trial shall be deemed waived; it cannot be waived in any other way.

The defendants did not fail to appear at the trial; they appeared and demanded a jury trial; and as they had not consented to waive their right in the mode prescribed by the law, the court erred in denying the right.

Judgment and order reversed, and cause remanded for a new trial.

SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 11554. Department Two.—August 26, 1886.]

I. W. HELLMAN, RESPONDENT, *v.* A. W. McWILLIAMS, GUARDIAN, ETC., OF EDWARD HAWKINS ET AL., MINORS, RESPONDENTS, AND W. D. STEPHENSON, ADMINISTRATOR, ETC., OF ELI W. HAWKINS, DECEASED, APPELLANT.

TRUST IN PERSONAL PROPERTY — MAY BE CREATED BY PAROL. — An express trust in personal property may be created without a written transfer.

ID. — RESERVATION OF RIGHT BY TRUSTOR. — A verbal transfer of money in trust for the use and benefit of the children of the trustor, reserving to the latter the right to draw from the trust fund such sums as he might deem proper for his own use, is valid.

ID. — REVOCATION BY TRUSTOR. — After a trust has been created and accepted, the trustor has no power to revoke it without the consent of the beneficiaries, unless such power was reserved in the declaration of the trust.

EVIDENCE — STRIKING OUT — MOTION FOR MUST BE SPECIFIC. — Where testimony is admitted, some of which is relevant and competent, and intermingled with that which is improper, a motion to strike out should be directed with such precision to the portion attached that no uncertainty may remain as to the testimony challenged; otherwise a refusal to strike out is not error.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order refusing a new trial.

The facts are stated in the opinion.

Gardiner & Stephenson, for Appellant.

Albert M. Stephens, and Glassell, Smith & Patton, for Respondents.

SEARLS, C.—This is an action brought to determine whether the estate of Eli W. Hawkins, deceased, or his minor children, are entitled to certain money in the hands of plaintiff.

The judgment awarded the property to the minor children, from which judgment, and from an order denying a motion for a new trial, the defendant, W. D. Stephenson, administrator of the estate of Eli W. Hawkins, deceased, appeals.

In September, 1879, there was due to Eli W. Hawkins from the Odd Fellows' Savings Bank the sum of \$14,-334.73, in evidence of which Hawkins held a pass-book of said bank, issued to him by the latter, showing said amount to be due.

The bank was in process of liquidation. On the eighth day of September, 1879, said Hawkins requested plaintiff to allow him, the said Hawkins, to assign to plaintiff the whole amount due from the bank, to be held by plaintiff in trust for the use and benefit of the minor children of Hawkins, reserving to himself, however, the right to draw such sums of said money from the trustee as he might deem proper for his own use.

Plaintiff agreed to accept the trust, and Hawkins verbally assigned to him all of said moneys, to be held by him in trust as aforesaid.

Hawkins delivered his pass-book to plaintiff, who has since retained it.

In order to carry into effect the assignment, and to facilitate the collection of the money for Hellman as

such trustee, Hawkins proposed to make a written assignment directly to said Hellman; but to facilitate the collection of the money and at the request of the latter, the assignment was made to the Bank of California, a corporation doing business in San Francisco, where the money was to be collected; and thereupon said Bank of California collected the money as agent and correspondent of Hellman, to whom it was transmitted at Los Angeles, the place of his residence.

Subsequent to the assignment, a power of attorney was also executed by Hawkins, at the request of Hellman, to the Bank of California, authorizing the latter to collect and receipt for the money.

This seems to have been done to simplify the process of collection under the rule of the Odd Fellows' Bank, and is found by the court to have been done "in furtherance of said assignment and trust in the said Hellman."

Eight thousand nine hundred and fifty-nine dollars and twenty cents was collected and paid over to plaintiff under this arrangement, of which sum Hawkins drew at divers times prior to his death \$6,271.44, leaving a balance in the hands of plaintiff of \$2,687.76, and there is still due from the Odd Fellows' Bank \$5,375.53, all of which the court finds is trust funds, of which the minor children of Hawkins are the beneficiaries.

The foregoing is a synopsis of so much of the findings of the court below as serve to give point to the objections of the appellant.

The contention of appellant is, that while an express trust may perhaps be created and proven by parol, still, conceding this point to create a trust by parol, the evidence must be *clear and unequivocal*, and that in the present instance the parol trust was not established by such clear and unequivocal testimony as to authorize the facts as found by the court, and that the facts shown by the evidence do not raise a trust.

Section 852 of the Civil Code declares the law as to the manner in which trusts in relation to real property may be created or declared, and provides that, except where created by operation of law, it shall be by an instrument in writing.

"Subject to the provisions of section 852, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor indicating with reasonable certainty,—

"1. An intention on the part of the trustor to create a trust; and 2. The subject, purpose, and beneficiary of the trust." (Civ. Code, sec. 2221.)

Having thus provided the manner in which a trust may be created, and the particularity requisite in its creation as to the trustor and beneficiary, the following section as to the trustee is important:—

"Subject to the provisions of section 852, a voluntary trust is created as to the trustee by any words or acts of his indicating with reasonable certainty.—1. His acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence; and 2. The subject, purpose, and beneficiary of the trust."

The subject of the trust was personal property, and it was not necessary that the transfer should be in writing. "A transfer may be made without writing in every case in which a writing is not expressly required by statute." (Civ. Code, sec. 1052.)

Referring to the testimony, we find there was evidence tending clearly to show the intention on the part of Hawkins to create a trust in favor of his minor children, that the subject of such trust was clearly defined, and its purpose made manifest.

The evidence as to the acceptance of the trust by the plaintiff, with full knowledge of the subject, purpose, and beneficiaries, is explicit, and the whole testimony taken together establishes the facts as found by the court with

such *reasonable certainty* that we are not at liberty to disturb the findings.

A trust may be created for any purpose for which a contract may be lawfully made. (Civ. Code, sec. 2320.)

It follows that Hawkins was under the law authorized to create a trust for himself and his minor children in the manner and form as found by the court. (*Hearst v. Pujol*, 44 Cal. 234.)

The fund was assigned to the plaintiff, the pass-book delivered to and retained by him, the money collected by the Bank of California for his account, and paid over to him. As to that portion of the fund paid over to Hawkins during his lifetime, no question is made here, and it can cut no figure, beyond tending to illustrate the true intent of the parties.

The trust once created and accepted, it was not in the power of the trustor to revoke it without the consent of the beneficiaries, unless power to do so was reserved in the declaration of the trust. (Civ. Code, sec. 2280.)

The motion to strike out the testimony of plaintiff was properly overruled.

The motion to strike out all of witness Hellman's testimony, "so far as it states the effect of what took place between himself and Eli W. Hawkins, except the naked statement of what was said and done," was so general and indefinite that we do not see how the court below could have determined precisely what portion of the testimony was intended, and had the motion been granted, we should be at a loss to know what was stricken out.

Where testimony is admitted, some of which is relevant and competent, and intermingled with that which is improper, a motion to strike out should be directed with such precision to the portion attacked that no uncertainty may remain as to the testimony challenged.

We think, therefore, the motion to strike out was properly denied.

Upon the whole case as presented, we are of opinion the judgment and order appealed from should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 11300. Department Two.—August 26, 1886.]

HUGH QUINN, APPELLANT, *v.* GEORGE ANDERSON ET AL., RESPONDENTS.

PUBLIC HIGHWAY — DEDICATION — CONCLUSION OF FACT — INTENTION. — The dedication of a road as a public highway is a conclusion of fact to be drawn from all the circumstances of each particular case, and cannot be presumed without evidence of an unequivocal intention on the part of the owner to make the dedication.

Id. — ERECTION OF GATES OVER ROAD. — The erection and maintenance of gates or other obstructions over a road is strong evidence in support of a mere license to the public to pass over it, and in rebuttal of its dedication to public use.

Id. — EVIDENCE OF DEDICATION. — Stronger evidence is required to establish the dedication of a neighborhood or timber road than of a thoroughfare, and in case of a county road than of a street in a town or city.

Id. — ACTION TO ENJOIN OBSTRUCTIONS — DAMAGES — FINDINGS — IMMATERIAL ISSUE. — In an action to enjoin the obstruction by the defendants of an alleged public highway over their land, and to recover damages for past obstructions, the issue raised as to the damages is immaterial, and no finding thereon is necessary if the court finds that the *locus in quo* belongs to the defendants, and never was a public highway.

APPEAL from a judgment of the Superior Court of Tuolumne County, and from an order refusing a new trial.

The facts are stated in the opinion.

Street & Street, for Appellant.

F. D. Nicol, for Respondents.

SEARLS, C. — This is an action to enjoin the defendants from obstructing a highway in the county of

Tuolumne, and to recover damages for obstructing the same.

Defendants had judgment, from which, and from an order denying a new trial, the plaintiff appeals.

The cause was tried by the court without a jury, and the findings show:—

1. That in September, 1883, defendants closed up that certain road leading from the county road known as the Sonora and Montezuma road, through the lands of the defendants to the ranch of the plaintiff.

2. That plaintiff had been accustomed to travel said road during the summer season for some ten years, and that persons having business with the plaintiff occasionally traveled the same in going to his ranch.

3. That said road was traveled by the public generally from 1850 to 1858, but for a period of twenty seven years last past has been abandoned by the public as a highway; that said road was never dedicated to or accepted by the public as a highway, and was never marked off or declared a highway.

4. That plaintiff has a good road leading through his own lands to the county road, which causes him to travel some two miles farther to market.

The conclusions are, that the road in question is neither a public nor private highway, and that plaintiff has suffered no damage by reason of defendants' acts in obstructing the road.

Public highways in this state "are roads, streets, alleys, lanes, courts, places, trails, and bridges laid out or erected as such by the public, or if laid out or erected by others dedicated or abandoned to the public, or made such in actions for the partition of real property." (Pol. Code, sec. 2618.)

It is not shown by the record that the road in question was ever laid out or erected by the public as a highway.

Was it ever *dedicated* or abandoned to the public as such highway?

The findings of the court below answer the question in the negative.

"The vital principle of dedication is the intention to dedicate, the *animus dedicandi*, and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made." (Angell on Highways, sec. 142.)

Dedication is therefore a *conclusion of fact* to be drawn from all the circumstances of each particular case.

The sole question as against the owner of the soil in such cases is, Does the evidence show an intention on his part to dedicate the land to the public as a highway?

Dedication is never to be presumed without evidence of an unequivocal intention on the part of the owner. (Angell on Highways, sec. 147.)

This intention may be inferred, however, by any acts on his part which satisfy the mind of the existence of the intent, and the character of the acts requisite will depend very much upon the situation of the land over which the way is claimed, its surroundings, uses, and a variety of other circumstances, tending to illustrate the intent.

We do not find in the evidence before us such proof of a dedication of the *locus in quo* to the purposes of a highway, either public or private, as will warrant us in disturbing the findings of the court below.

It appears that the passage of the road had for years been barred by gates or other obstructions, to be opened and closed by parties passing over the land.

This, in the absence of a statute providing therefor, as is sometimes found in case of highways, has always been considered as strong evidence in support of a mere license to the public to pass over the designated way, and in rebuttal of a dedication to public use. (Angell on Highways, sec. 152; *Commonwealth v. Newbury*, 2 Pick. 51; *Proctor v. Lewiston*, 25 Ill. 153; *State v. Strong*, 25 Me. 297.)

Again, stronger evidence is required of the dedication of a neighborhood or timber road than of a thoroughfare (*Onstott v. Murray*, 22 Iowa, 457); and in case of a country road than of a street in a town or city. (*Harding v. Jasper*, 14 Cal. 649.)

The complaint avers that the plaintiff has been damaged by the wrongful acts of defendants in obstructing the road, in the sum of \$250. This is denied by the answer.

There was some testimony on the part of plaintiff tending to show injury sustained by him on account of the obstruction of the highway. There is no direct finding by the court on this issue, and plaintiff assigns this omission as error.

The rule is well established in this court that the findings must be responsive to and cover all the material issues in the case.

A material issue may, however, become immaterial so as to require no findings by reason of findings upon other issues. (*Porter v. Woodward*, 57 Cal. 535; *McCourtney v. Fortune*, 57 Cal. 617.)

That was precisely the case here. If the alleged highway was not such in fact, and if the defendants had a right as the owners of the land over which it passed to obstruct and close it, then, as their acts were lawful, there could be no recovery against them, and manifestly the question of the injury sustained by plaintiff became immaterial, and no findings as to the amount thereof could avail by way of benefit to him.

No damage can be recovered for the consequences of a lawful act properly performed.

In such cases, if an injury is sustained, it is *damnum absque injuria*.

The judgment and order appealed from should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 11574. In Bank.—August 26, 1886.]

COUNTY OF AMADOR, RESPONDENT, *v.* PHILLIP KENNEDY, APPELLANT.

LICENSE — SALE OF LIQUORS — SUPERVISORS MAY APPOINT COLLECTOR — SALARY — ACTION TO RECOVER LICENSE. — The board of supervisors of a county have authority to appoint an agent to collect the license taxes imposed by an ordinance upon the business of selling liquors at retail, to fix the compensation to be paid him therefor, and to empower him to direct actions against persons failing to procure licenses.

ID. — DISCRIMINATING RATES BETWEEN COUNTRY AND CITY. — Such an ordinance is not invalid because it fixes a less rate of license for the business of selling liquors at a wayside tavern or watering-place than for the same business carried on in a village, town, or city.

APPEAL from a judgment of the Superior Court of Amador County.

The license tax in question was imposed upon the business of selling spirituous, malt, and fermented liquors at retail. The ordinance appointed an agent to collect the taxes, and fixed his compensation. The further facts are stated in the opinion of the court.

Eagon & Armstrong, and *Rust & Caminetti*, for Appellant.

McGee & Farnsworth, and *Lindley & Spagnoli*, for Respondent.

THORNTON, J.—This action was brought to recover of defendant a license tax amounting to thirty dollars, and a penalty for not paying the same when demanded, under an ordinance passed by the board of supervisors of the county above named.

The action was commenced in a justice's court. The answer of the defendant, duly verified, attacked the validity of the ordinance imposing the tax above mentioned, and on that account was transferred to the Superior Court of Amador County for trial. On that trial,

judgment passed for plaintiff. From this judgment defendant appealed.

It is contended that the board of supervisors had no authority to appoint an agent to collect the license taxes under the above ordinance.

We consider this point settled by the judgment of this court in *People v. Ferguson*, 65 Cal. 288, adverse to the contention of appellant. We are satisfied of the ruling in the case referred to, and refuse to disturb it.

It is further contended that subdivision five (5) of section two (2) of this ordinance is illegal and void because it discriminates between villages, towns, and wayside inns or watering-places. The subdivision referred to is as follows:—

“For selling spirituous, malt, or fermented liquors or wines at retail, in quantities less than one quart, thirty dollars per quarter; for selling spirituous, malt, or fermented liquors or wines at wholesale, in quantities of one quart or more, ten dollars per quarter; provided that any person or persons who sells at retail such liquors or wines at any way-tavern or public watering-place on any thoroughfare outside the limits of any village, town, or city, shall pay seven and a half dollars per quarter; and provided further, that any person or persons who takes out a license for retailing such liquors or wines shall have the privilege of selling such liquors or wines at wholesale without any other license therefor.”

We fail to see any unlawful discrimination in the portion of the section above quoted. The discrimination allowed here violates no provision of the constitution, and contravenes no rule of law of which we have any knowledge. What law or what provision of the constitution it violates is not pointed out by the appellant. The difference between the quantum of sales made and the prospective profit to be realized by persons retailing liquors in a village, town, or city, and persons retailing the same at a wayside inn or rural watering-place is man-

ifest to every one. This difference amply justifies the discrimination made by the ordinance under consideration. Such legislation is sustained by numerous cases. (See *People v. Thurber*, 13 Ill. 554; *City of East St. Louis v. Wehrung*, 46 Ill. 393; S. C., 46 Ill. 32; *Slaughter v. Commonwealth*, 13 Gratt. 767; *Texas B. & I. Co. v. State*, 42 Tex. 636; *State v. Rolle*, 30 La. Ann. 991.)

There is nothing in the subdivision of the ordinance in question which is unreasonable, oppressive, or in restraint of trade.

It is urged that section five (5) of the ordinance is illegal and void because the board of supervisors has thereby fixed the compensation of the license collector, which can only be done by the legislature.

Having already determined that the ordinance was valid so far as the appointment of license collector is regarded, we do not perceive the materiality of the above stated question urged by defendant. Conceding that the appointment of license collector is valid, it is entirely immaterial, so far as defendant is concerned, whether the portion of the ordinance fixing the compensation is valid or not.

We find no new rule of evidence created by the ordinance, nor do we find any double taxation authorized by it.

The power conferred on the license collector to direct a civil action against a person failing to procure a license as required by the ordinance is a means of collection which the board of supervisors may employ under the power to collect conferred on it by subdivision 27 of section 25 of the county government law.

We see nothing in the other points urged on behalf of appellant that deserve consideration.

Judgment affirmed.

MORRISON, C. J., SHARPSTEIN, J., and MYRICK, J., concurred.

[No. 11233. In Bank.—August 26, 1886.]

THE PEOPLE EX REL. JAMES BETTNER, APPELLANT, v. CITY OF RIVERSIDE, RESPONDENT.

MUNICIPAL CORPORATION — PROCEEDINGS FOR ESTABLISHMENT OF — NOTICE OF ELECTION — CITY OF THE SIXTH CLASS. — The notice of the election for the incorporation of the defendant recited that "a petition having been duly presented to the board of supervisors of the county of San Bernardino, signed by at least one hundred qualified electors of the county resident within the limits of the proposed corporation, which petition particularly set forth the boundaries of this proposed corporation, and stated the number of inhabitants therein to be about three thousand." Held, that the notice was sufficient to indicate to the voters that the proposed city would be of the sixth class, under the act of March 13, 1883.

IN. — INCLUSION OF LANDS NOT BENEFITED. — The propriety of establishing a municipality, and of including within its boundaries a particular territory, is in general a political question for the legislative department of the government; and if the course pursued in establishing a given municipality substantially complies with the statute, the courts will not interfere on the ground that certain territory would not derive any benefit from being included therein.

APPEAL from a judgment of the Superior Court of San Bernardino County.

The facts are stated in the opinion, and in the opinion of Mr. Justice Myrick in Department Two.

Attorney-General Marshall, and Byron Waters, for Appellant.

Curtis & Otis, and H. C. Rolfe, for Respondent.

FOOTE, C.—Department Two of this court affirmed the judgment of the court below, which had been rendered in favor of the defendant.

The only point advanced by the plaintiff on a rehearing questioning the correctness of that opinion is that the notice of the election given by the board of supervisors is defective in that there was nothing in it from which the voters could classify the proposed municipal corporation, or vote intelligently upon the question of incorporation.

The part of the notice material to the question raised is as follows:—

“Election notice to incorporate the city of Riverside:—

“A petition having been duly presented to the board of supervisors of the county of San Bernardino, signed by at least one hundred qualified electors of the county resident within the limits of the proposed corporation, *which petition particularly set forth the boundaries of this proposed corporation, and stated the number of inhabitants therein to be about three thousand,*” etc.

Before reading that petition, the voter was charged with notice of the fact that under the law of this state a city of the sixth class must be one not exceeding three thousand in population. Possessed of such knowledge, upon reading the notice under consideration, he would further perceive that he was to vote upon the question of incorporating or not a city to be called Riverside. That a petition had been presented to the board of supervisors which declared to such a board that the proposed limits of the municipal corporation would contain about three thousand inhabitants. A reasonable interpretation of “about three thousand inhabitants” is three thousand inhabitants, and no excess above that. Thus the voter would be notified that the board of supervisors had received that information; and as there is nothing in the notice which indicates that the said board doubted that such statement was true, or gave expression to anything which would negative the idea that they had ascertained that the proposed corporation limits would contain three thousand inhabitants, the voter would come reasonably and naturally to the conclusion that he was to vote for or against the incorporation of a city to be called Riverside, the proposed limits of which would contain a population not exceeding three thousand; and as he already knew that such a city would under the act of March 13, 1883, be of the sixth class, we do not perceive but what the notice contained all that was

required to enable a voter to cast his ballot understandingly.

We perceive no reason why the judgment formerly rendered by Department Two should not be adhered to.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

The following is the opinion of Department Two above referred to, rendered on the 30th of January, 1886:—

MYRICK, J.—This action was brought to have it determined that the defendant unlawfully holds and exercises the franchise and powers of a municipal corporation. Two points are made on the appeal:—

1. The findings of fact are silent on the issue presented in the complaint that it was in excess of the jurisdiction of the board of supervisors to include within the boundaries of the proposed city any of the territory not settled upon and occupied as the village proper of Riverside; and that all action of said board including within the boundaries of the proposed municipality any territory except such village was unreasonable and oppressive, and therefore void, in that no territory other than the village would derive any benefit from being included therein.

The propriety of establishing a municipality, and of including within its boundaries a particular territory, is in general a political question for the legislative department of the government. If the course pursued in establishing that municipality be substantially such as is pointed out by the law-making department, courts do not interfere.

All the facts necessary to give the board of supervisors jurisdiction were found by the court below. From the facts thus found, it appears to us that the requirements of

the statute were substantially complied with. Therefore, whether or not the board of supervisors had jurisdiction to proceed became a question of law, and no finding was necessary. It was not necessary for the court to find whether or not territory not settled upon and occupied as a village proper was embraced within boundaries of the proposed municipality, or whether the territory would or would not derive benefit from being included.

2. That the notice of election did not state the number of inhabitants ascertained to reside within the boundaries.

The statute (Stats. 1883, p. 94) required the notice to state "the number of inhabitants so ascertained to reside therein." The object of this provision is that it may be known to which class the proposed municipality is to belong.

It appears from the findings that at the final hearing before the board of supervisors, the board ascertained and determined the number of inhabitants residing within the boundaries to be not less than five hundred, and not exceeding three thousand, and granted the petition with certain modifications as to territory; and the board caused notice of an election to be held under the statute, which notice, among other things, gave the number of inhabitants within the limits of the proposed corporation to be about three thousand. We think it sufficiently appears from the notice given that the proposed municipality would belong to the sixth class, which class, under the statute, embraces exceeding five hundred and not exceeding three thousand inhabitants.

Judgment affirmed.

[No. 9965. In Bank.—August 26, 1886.]

F. H. ROSS, APPELLANT, *v.* JAMES BRUSIE, RESPONDENT.

DEED ABSOLUTE ON ITS FACE — MORTGAGE — FINDING — CONFLICT OR EVIDENCE. — Where an issue is raised as to whether or not a deed absolute on its face was intended as a mortgage, a finding that it was executed in payment of a debt will not be disturbed, if the evidence as to its character is conflicting.

ID. — BOOKS OF ACCOUNT — EVIDENCE TO SHOW CREDIT HAS BEEN GIVEN. — The plaintiff, being indebted to the defendant on a book-account, conveyed to the latter the land in controversy in consideration of an agreement by him to give the former credit for a specified amount on his account. At the trial, the court, against the objection of the plaintiff, permitted the defendant to introduce his account-books in evidence to show that the credit had been given. *Held*, that the books were properly admitted.

APPEAL from a judgment of the Superior Court of Stanislaus County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

L. J. Maddux, and Wright & Hazen, for Appellant.

W. E. Turner, D. S. Terry, and Cope & Boyd, for Respondent.

MORRISON, C. J.—This suit was brought in the county of Stanislaus by plaintiff and appellant against defendant and respondent, to compel a reconveyance of a certain lot of land in the town of Modesto, in the county of Stanislaus. Defendant had judgment, from which, and the order of the court below denying a new trial, the plaintiff appeals to this court.

The record shows but one exception taken on the trial, and there is but one question for determination on this appeal.

On the trial, a controversy arose as to the character of a certain transaction between the parties relating to the

lot of land in suit. Ross contended that it was only a mortgage from himself to Brusie, and the latter contended that it was a deed absolute. An inspection of the papers in the case shows that the conveyance from Ross to Brusie was an absolute deed, and the court finds "that for the purpose of liquidating and paying said sum of \$250, plaintiff, on the twenty-fifth day of January, 1887, made, executed, and delivered to defendant a grant, bargain, and sale deed of the following described piece or parcel of land" (describing it). The testimony being conflicting as to the character of the transaction, the finding of the court on it is final and conclusive. Presumptively the instrument expressed the true nature of the transaction, and as the court finds it to have been what on its face it appears to have been, the finding of the court in this regard will not be disturbed.

On the trial, the defendant was permitted, against plaintiff's objection, to prove by the introduction in evidence of certain books of account that respondent had carried into the books a credit of \$250 to the account of plaintiff. The evidence was, that defendant agreed to give the plaintiff a credit on his account for the sum of \$250 in payment for said lot; and in order to prove that he had kept his contract and given the plaintiff the credit in question, he was permitted to prove the fact by his own books. This was not the case of a party making evidence for himself, as is claimed by plaintiff. The books were not offered for the purpose of establishing a claim against the plaintiff, but simply to show that defendant had performed his contract, and had given plaintiff the credit he promised him. Defendant promised to give plaintiff credit for \$250. That was the contract. To prove that he had done this, he was allowed to introduce in evidence the books where the credit was entered. We see no objection to this. It was like proving any other act defendant had promised to perform as a condi-

tion on which his right to maintain or defend the suit depended.

Judgment and order affirmed.

SHARPSTEIN, J., ROSS, J., and MCKINSTRY, J., concurred.

[No. 20207. In Bank.—August 26, 1886.]

THE PEOPLE, RESPONDENT, *v.* J. G. GORDON, APPELLANT.

RAPE — ASSAULT WITH INTENT TO COMMIT — GIRL UNDER TEN YEARS OF AGE — CONSENT. — A conviction of an assault with intent to commit rape upon a girl under ten years of age may be had without showing her want of consent to the assault.

ID. — PRESUMPTION AGAINST CONSENT. — A girl under ten years of age is presumed incapable of consenting to an act of sexual intercourse, or to an assault with intent to commit it.

APPEAL from a judgment of the Superior Court of Solano County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

George A. Lamont, and John M. Gregory, for Appellant.

Attorney-General Marshall, for Respondent.

MCKEE, J.—The appeal in this case is from an order denying a new trial, and a judgment of conviction of assault with intent to commit rape.

The contention made by the appellant is that the court below erred in refusing to instruct the jury,—

“1. To convict the defendant, you must find beyond a reasonable doubt that the assault, if any was committed, was committed by force and against the will, wish, and consent of Annie Jensen.

“2. An assault implies force on one side, and repulsion, or at least want of consent, upon the other.

"3. An assault upon a party who consents thereto is a legal absurdity and impossibility.

"4. There is no proof here that an assault was committed, and you must therefore acquit the defendant."

An assault, if actually made with an intent to commit rape, is a felony *per se*, and this because of the mere intent with which it is made. The particular means resorted to in making such assault form no elements of the offense. (*People v. Murat*, 45 Cal. 283.) But there must be some evidence tending to show that an assault was actually made.

An assault is defined as an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another. (Pen. Code, sec. 240.)

Such an attempt must be made without the consent of the person against whom it is made. If it be made with his consent, it will not constitute an assault. It is a maxim of the law that one who consents to an act is not wronged by it. (Civ. Code, sec. 3515.) Where, therefore, a person is charged with an assault upon the person of a woman to violate her person, the question of consent is material; there must be some evidence that the act was committed without her consent, and the fact is to be found by the jury upon the evidence of the circumstances in which the act was committed.

But this is not that case. The record shows that an assault was made by the defendant upon the person of a girl under ten years of age. No evidence appears to have been given tending to show that the girl consented or resisted, but it is claimed for the defendant that she consented because she did not resist.

It is, however, a presumption of law that a girl under ten years of age is incapable of consenting to the offense of rape (Pen. Code, sec. 261); and as such an offense includes an attempt to commit it, accompanied by such force and violence upon the person as constitutes an assault, a girl under ten years of age is incapable in law of

consenting to the assault in connection with the attempt to commit the offense. Whether the girl in fact consented or resisted was therefore immaterial. Being incapable of consenting to an act of carnal intercourse, it was criminal for the defendant to make an assault upon her to commit such an act; and the court did not err in giving its instructions to the jury, or in refusing to give those which were asked by the defendant.

The evidence was sufficient to support the verdict.

Judgment and order affirmed.

MORRISON, C. J., Ross, J., McKinstry, J., Myrick, J., and Sharpstein, J., concurred.

[No. 20192. In Bank.—August 26, 1886.]

THE PEOPLE, RESPONDENT, v. JUNG QUNG SING,
APPELLANT.

CRIMINAL LAW — MURDER — PRONOUNCING JUDGMENT — PRELIMINARY REQUIREMENTS. — The defendant was convicted of murder in the first degree. When he appeared for judgment, the court informed him of the information presented against him for the crime of murder, of his arraignment and plea of not guilty, of his trial and the verdict finding him guilty of murder in the first degree. He was then asked whether he had any legal cause to show why judgment should not be pronounced against him, and having replied in the negative, was sentenced to be hanged. *Held*, that the requirements of section 1200 of the Penal Code were sufficiently complied with.

ID. — PRESENCE OF DEFENDANT UPON RETURN OF VERDICT — RECORD WHEN SUFFICIENTLY SHOWS. — The record in a prosecution for felony sufficiently shows that the defendant was present in court when the verdict against him was received, if it recites that the parties and their attorneys were present at every stage of the proceedings, and that upon the discharge of the jury the defendant was remanded to the custody of the sheriff.

APPEAL from a judgment of the Superior Court of Santa Clara County.

The facts are stated in the opinion of the court.

M. E. Power, and C. L. Witten, for Appellant.

Attorney-General Marshall, Howell C. Moore, and D. W. Burchard, for Respondent.

MCKEE, J.—This is an appeal from a judgment of conviction of murder in the first degree.

It is assigned as error that the judgment pronounced against the defendant is not in conformity with section 1200 of the Penal Code which reads: "When the defendant appears for judgment, he must be informed by the court, or by the clerk under its direction, of the nature of the charge against him, and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him."

According to this law, a defendant under conviction in a criminal action, before judgment can be legally pronounced against him, is entitled to be informed of the nature of the charge against him, and of the verdict of conviction upon which the sentence of the law has to be pronounced, so that he may have an opportunity of exercising his right to show cause against pronouncing judgment. If the court should pronounce judgment without giving defendant the required information in the mode prescribed by the law, the judgment pronounced would be irregular and voidable. The right of the defendant under conviction to be informed before judgment of the proceedings against him which have resulted in his conviction is therefore a substantial right.

But there was no denial of the right in this case. The judgment recites:—

"The district attorney, with the defendant and his counsel, M. E. Power and C. L. Witten, Esqs., came into court. The defendant was duly informed by the court of the information presented against him for the crime of murder on the twenty-seventh day of October, 1885, of his arraignment and plea of not guilty, of his trial,

and the verdict of the jury on the twenty-seventh day of January, 1886, 'guilty of murder in the first degree.' The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replies that he has none. And no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment.

"That whereas the said Jung Qung Sing having been duly convicted in this court of the crime of murder in the first degree, it is therefore ordered, adjudged, and decreed that judgment of death be and is hereby pronounced and entered against the said defendant, Jung Qung Sing, and that he be by the sheriff of Santa Clara County, at the place provided by law, hanged by the neck until he be dead. The defendant was then remanded to custody."

It is said these recitals are insufficient to show that the defendant was properly informed of the *nature* of the charge against him, or that he was asked if he had *any cause* to show why judgment should not be pronounced against him. But the statement by the court of the specific crime with which defendant was charged, and of which he had been convicted, was sufficiently explicit as to the nature of the charge and the conviction, as preliminary to the question by which the defendant was asked if he had any legal cause to show why judgment should not be pronounced. Unless there exist some legal cause against pronouncing judgment, the court was bound to proceed. (Pen. Code, secs. 1201, 1202.) The question which the court asked of the defendant was in the exact form prescribed by the law. And the judgment pronounced is according to law.

The next assignment of error is, that the record nowhere states that the defendant was present in court when the verdict was received.

There is no doubt that in case of felony a verdict received in the absence of the defendant would be void.

(Penal Code, sec. 1148; *People v. Beauchamp*, 49 Cal. 41.) The defendant must therefore be personally present when the jury render their verdict. But the record of the case shows that "the parties" and their attorneys appeared at every stage of the proceedings from the day that the cause was called for trial until the verdict was received and the jury discharged. And as the "parties" to a criminal action are the people on the one hand and the defendant on the other, it must be presumed that the defendant was personally present. Besides, the entry on the minutes of the court as to the return of the verdict shows that when the verdict as announced was entered and read to the jury the court ordered the jury discharged, and the defendant remanded to the custody of the sheriff, which was done.

It is not claimed that the trial was had in the absence of the defendant. No motion for a new trial was made on that ground under section 1181 of the Penal Code. Moreover, the amended record, filed upon a suggestion of diminution of the record, shows conclusively that the defendant was personally present at all times during the trial of the cause; therefore the assignment of error is not true.

The motion to strike from the files the amended record must be denied and the judgment affirmed.

It is so ordered.

MORRISON, C. J., THORNTON, J., SHARPSTEIN, J., MCKINSTRY, J., and MYRICK, J., concurred.

Ross, J., concurred in the judgment.

[No. 20162. In Bank.—August 26, 1886.]

THE PEOPLE, RESPONDENT, *v.* PEDRO PACHECO,
APPELLANT.

RAPE — INFORMATION — ALLEGATION OF RESISTANCE. — An allegation in an information for rape that the act was committed by force and violence, and against the will and consent of the female, is equivalent to a statement that she resisted, but that her resistance was overcome by violence, or that she was prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution; and under such an allegation, evidence that she resisted or was prevented from resisting is admissible.

INSTRUCTION NEED NOT BE REPEATED. — The refusal to give instructions which have already been given in substance is not error.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order refusing a new trial.

J. H. Campbell, for Appellant.

Attorney-General Marshall, Howell C. Moore, and D. W. Burchard, for Respondent.

MYRICK, J.—1. The defendant was accused by information of the crime of rape, the act being charged to have been “committed by force and violence, and against the will and consent of the person named as the subject of the act.” Objection is made that the information did not contain an element of resistance on the part of the person; that subdivisions 3 and 4 of section 261 of the Penal Code have made resistance or prevention of resistance an element necessary to be alleged in order to state the offense.

We are of opinion that when the information stated that the act was committed by force and violence, and against the will and consent of the female, it was substantially equivalent to stating that she resisted, but that her resistance was overcome by violence, or that she was prevented from resisting by threats of immediate and great

bodily harm, accompanied by apparent power of execution.

Under the information as it reads, it was competent to prove that the act was committed under the circumstances provided for in either of the subdivisions referred to.

2. There was some evidence before the jury as to acts of resistance, and some evidence as to prevention of further resistance,— sufficient, at all events, for the consideration of the jury. The instructions to the jury upon this subject were as favorable to the defendant as he was entitled to. We see no error in the action of the court as to the instructions refused. All instructions to which the defendant was entitled were given, either in the instructions allowed or in the general charge.

Judgment and order affirmed.

MCKEE, J. MCKINSTRY, J., Ross, J., SHARPSTEIN, J., and MORRISON, C. J., concurred.

[No. 11096. Department One.—August 27, 1886.]

JAMES McCORMICK, ADMINISTRATOR ETC. OF ANTOINE PHILLIPS, DECEASED, RESPONDENT, *v.* ALEXANDER ROSSI, APPELLANT.

CONTRACT FOR SALE OF LAND — FORFEITURE — FAILURE TO PAY PURCHASE PRICE. — The failure of the vendee under a contract for the sale of land to pay the purchase price within the time stipulated, or to perform other conditions of the contract, is no ground for a decree in equity declaring a forfeiture of his rights. A court of equity will never enforce a penalty or forfeiture.

APPEAL from a judgment of the Superior Court of Placer County.

The facts are stated in the opinion.

Hale & Craig, and *D. W. Spear*, for Appellant.

J. E. Prewett, for Respondent.

BELCHER, C. C.— This is an action upon a contract made by the plaintiff's intestate for the sale of a mining claim to the defendant for the sum of six thousand five hundred dollars.

It is alleged in the complaint that the defendant had paid only thirteen hundred dollars of the agreed purchase price; that he had failed to work the mine as required by the contract; that the full amount of the purchase-money had become due; and that in consequence of his failure to pay the same he had by the terms of the contract forfeited all his rights thereunder.

The prayer is, that it be “decreed that defendant has committed a breach of said contract, and has forfeited all his rights thereunder and to the possession of said property.”

The defendant in his answer alleged that he had paid \$1,504.50 of the purchase money; and he denied that by not paying the balance thereof or otherwise he had failed to comply with the terms of the contract, or had forfeited all or any of his rights under it.

Judgment was entered declaring forfeited all the defendant's rights under the contract, and ordering the possession of the property to be restored to the plaintiff; and the defendant appealed.

In *Keller v. Lewis*, 53 Cal. 118, the court said: “It is a universal rule in equity never to enforce either a penalty or forfeiture. (2 Story's Eq. Jur. sec. 1319, and cases cited.) On the contrary, equity frequently interposes to prevent the enforcement of a forfeiture at law.” Judgment declaring a forfeiture had been entered in that case and was reversed. This case is in all essential particulars like that, and the judgment here should also be reversed, and the cause remanded, with leave to the plaintiff to amend his complaint if so advised.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded, with leave to the plaintiff to amend his complaint if so advised.

[No. 9110. Department One.—August 27, 1886.]

WILLIAM HAYWARD, RESPONDENT, *v.* JOHN MANZER ET AL., APPELLANTS.

DEDICATION — FILING AND RECORDING MAP — ACCEPTANCE BY PUBLIC. — The filing and recording of a map of a tract of land, certain portions of which are delineated thereon as public streets, is a mere offer of dedication to the public of the streets, which does not become effectual as an irrevocable dedication until its acceptance by the public. Such an acceptance is ordinarily made manifest by a use on the part of the public for such a length of time as will be sufficient to evince its acceptance of the dedication as intended to be made.

D. — DEDICATION OF STREET — NON-ACCEPTANCE FOR TWENTY YEARS. — The owner of a tract of land caused a map thereof to be made and recorded, on which the *locus in quo* was delineated as a public street. About one year afterwards, he conveyed a portion of the land, including the *locus in quo*, to the plaintiff, who immediately entered into the exclusive possession thereof, and so remained for a period of twenty years, claiming the same adversely to the whole world. During this time, the *locus in quo* had never been accepted or used by the public as a street. *Held*, that the land had never been dedicated as a public street.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order refusing a new trial.

The facts are stated in the opinion.

Mastick, Belcher & Mastick, for Appellants.

Colin Campbell, and *Tilden & Tilden*, for Respondent.

FOOTE, C.—The plaintiff, Hayward, brought an action to recover damages for trespass committed, as he alleged, by defendants, the marshal and board of trustees of the town of Hayward. He complained that they had un-

lawfully intruded upon his land, and torn down his fences, cut down and dug up his trees, and threw open his land for use as a public highway of that town. He prayed for damages against them for the acts of trespass committed, and for a perpetual injunction to prevent them and their successors, etc., from the commission of further acts of that nature.

The cause was tried by the court without a jury. The plaintiff obtained a judgment for fifty dollars and costs of action, and that the defendants be enjoined as prayed for. From that and an order denying a new trial the defendants appealed.

The principal grounds for the reversal of the judgment and order relied on are, that the evidence was insufficient to justify the findings, but conceding it to have been sufficient, that upon such findings the judgment should have been for the defendants.

Upon a careful examination of the whole record, we are convinced that the findings are sustained by sufficient evidence.

They are as follows:—

“ 1. That plaintiff and his grantors have been in possession of the land and premises in complaint described, claiming as owners and exercising acts of ownership over same, for about the period of twenty years.

“ That for about four years prior to the commencement of this suit plaintiff inclosed the premises in dispute (as a portion of the larger tract owned by him for several years prior thereto) with a substantial picket fence.

“ That two rows of trees were planted on said premises,—one by plaintiff's grantor, and one by plaintiff,—one of said rows of trees running near the line of plaintiff's fence.

“ That said land was graded or filled in by plaintiff.

“ 2. That in February, 1877, defendants tore down the fence upon said land and entered thereon for the pur-

pose of opening a street over it. That they did this under an order or resolution of the board of trustees of said town of Hayward, who claim that the paramount owner of the land had dedicated it to public use as a street of said town. That defendants John Manzer, Thomas A. Cunningham, Joseph Pimental, L. Livikin, and J. D. Austin constitute said board of trustees, and that defendant Horn is the marshal of said town, and that they were such officers at the time of the commencement of these proceedings. That in 1854, Guillermo Castro, claiming to be the owner of and being in possession of the rancho San Lorenzo, claiming same under a Mexican grant, caused to be made a map of that part of the rancho on which he laid out a town called San Lorenzo (now the town of Hayward). That said map was filed in the recorder's office of the county of Alameda.

"That upon this map a street called Castro Street was laid out and differently located from the location of a street called by the same name upon a second and subsequent map of said town. That some few sales were made under said map.

"4. That in 1856 said Castro caused a second and different map to be made and filed in the office of the recorder of said Alameda County of said town of San Lorenzo (now Hayward), altering the first plan of said town, and increasing the size of the blocks, and materially changing said town from what it was as delineated on said map of 1854, and upon which said last-named map of 1856 said Castro Street is located farther to the southwest than upon said map of 1854.

"That said Castro Street as laid down on said map of 1856 extended north $36^{\circ} 24'$ west through said town, and intersected a country road leading from San Leandro to the Mission of San José, south of a line on the said last-named map marked Pierce Street, and south of the land of plaintiff (in dispute). That south of the intersection of said Castro Street with the county road, Castro Street

was opened and used as a public road, but not on the north of said point.

“ That said Castro Street as delineated on said map extended several blocks to the north of Pierce Street, but was not opened or used as aforesaid. That both said maps were filed in said recorder's office of Alameda County before the United States patent was acquired to said rancho San Lorenzo. That some sales were made under said map of 1856.

“ 5. That in 1856, Castro conveyed to plaintiff a portion of said rancho, lying north of Pierce Street and east of the country road, and including said Castro Street as delineated in said map of 1856, and included in such conveyance. That the county road was recognized as a boundary in said conveyance.

“ 6. That in 1858 and 1859, Castro mortgaged the remainder of his rancho, including that portion of it on which the town had been laid out. That said mortgages were foreclosed, and the mortgaged premises passed by judicial sales under decree of foreclosure to F. D. Atherton, who, as owner thereof, in 1862 made and filed a new map of the town of Hayward, on which said Castro Street as delineated is cut off at its intersection with the county road at the point hereinbefore mentioned, and that Castro Street as therein delineated does not embrace any part of the land in dispute. That a great many sales of land have been made by reference to said map.

“ That said town of Hayward was incorporated in 1876, and that the board of trustees constituted under said incorporation accepted the alleged dedication under the map made and filed by Guillermo Castro in 1856.

“ That there are various shade and ornamental trees on said land, which defendants have threatened and intend to cut down and destroy.”

Before a person's land can be declared a public highway, it must be clearly proven that the same has been dedicated as such; and when it is undertaken by city au-

thorities to remove fences or improvements therefrom as a nuisance, they must affirmatively show such a dedication. *Tate v. City of Sacramento*, 50 Cal. 242.)

When Guillermo Castro on the thirtieth day of September, 1856, within a year of the time of filing the map of 1856 of the town of San Lorenzo (now Hayward), deeded to the plaintiff a portion of Castro Street as laid down on said map, and bounded the tract of land which he thus conveyed by the county road on the west, the public had never accepted or used the part of the street including the land in dispute here as intended to be dedicated; and the town of Hayward had not then been incorporated. It is therefore evident that the deed above referred to was a complete revocation by Castro of his alleged dedication so far as it affected the public, howsoever it may have been as to the few persons who had purchased lots according to said map, whose rights in the premises we do not now determine.

By the filing of that map and having it recorded, Castro merely made an offer of dedication to the public of the streets which were shown by said map, which offer could not become effectual as an irrevocable dedication to the public use until its acceptance by the public. (*People v. Williams*, 64 Cal. 498-502; *San Francisco v. Canavan*, 42 Cal. 542-548; *San Francisco v. Calderwood*, 31 Cal. 589; *Washburn on Easements*, 132; *Harding v. Jasper*, 14 Cal. 647; *Child v. Chappel*, 9 N. Y. 257.)

Such acceptance is ordinarily made manifest by a use on the part of the public for such a length of time as will be sufficient to evince its acceptance of the dedication as intended to be made. (*Washburn on Easements*, 139, 140.)

It does not appear by the record that the public or the defendants, either before or after the deed of revocation made by Castro, ever used Castro Street at the place where it was originally designed to impinge upon the plaintiff's land; but it appears that by preference the public had always from its establishment used the county

road instead, that road having been about the year 1855 laid out as a public thoroughfare (somewhat identical with Castro Street,) by the proper authorities of Alameda County.

Any right the public or the defendants may have had to use the land in dispute as part of Castro Street was never availed of; and as the plaintiff during the period of about twenty years had by himself or his grantors been in the exclusive possession of such part of said street, his right thereto had become paramount to that of the public or the town of Hayward.

In other words, the plaintiff by himself or his grantors claimed and held possession of the land in controversy for twenty years adverse to the whole world, and neither the public nor the defendants had at any time accepted or used that land as intended to be dedicated by Castro.

Hayward's effort, as disclosed by the record, is not to hold possession by means of the statute of limitations of a portion of what in fact had once been a public highway. It is to retain possession of land which in fact had never been accepted nor used as the public highway, and had been in his adverse possession for twenty years.

Such being the case, the proceedings on the part of the authorities of the town of Hayward to remove a nuisance from a public street was not authorized, since what they claimed to belong to a street had never been dedicated, used, or accepted as such.

The effort made to devote Hayward's land to the public use as a street, and the other trespasses committed thereon, in the manner attempted and partially accomplished, were contrary to law, and the judgment and order of the trial court should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

[No. 11433. Department One.—August 27, 1886.]

AUGUST HEILBRON ET AL., APPELLANTS, *v.* JOHN HEINLEN, RESPONDENT.

NEW TRIAL — NOTICE OF INTENTION — STRIKING OUT — WANT OF DILIGENCE. — A notice of intention to move for a new trial cannot be stricken out for want of diligence in prosecuting the motion.

TRESPASS BY CATTLE — LAND IN FRESNO AND TULARE COUNTIES — LIMITATION. — In an action to recover damages for trespasses committed by cattle on land situated in Fresno and Tulare County, the right of recovery is not limited to trespasses committed within sixty days prior to the commencement of the action.

APPEAL from a judgment of the Superior Court of Fresno County, from an order refusing a new trial and from an order striking out the notice of intention to move for a new trial.

The action was brought to recover damages alleged to have been sustained by reason of the trespass of cattle on lands of the plaintiffs situated in Fresno and Tulare counties. On the trial, the plaintiffs offered proof of trespasses more than sixty days prior to the commencement of the action. The defendant claimed that under the act of February 4, 1874, the plaintiffs were not entitled to recover for any trespass not committed within sixty days before the commencement of the action, and objected to the proof offered. The act referred to was entitled "An act to protect agriculture, and prevent the trespassing of animals upon private property in the counties of Fresno, Tulare, Kern, Ventura, Santa Barbara, San Luis Obispo, and Monterey," and gave a remedy by process *in rem* against the cattle themselves when taken damage-feasant. The act also provided that if the owner of the land did not avail himself of that remedy, he might maintain an action to recover his actual damages against the owner of the cattle, provided the action were commenced within sixty days. The further facts are stated in the opinion of the court.

Terry & Terry, for Appellants.

G. A. Heinlen, and *Sayle & Harris*, for Respondent.

MYRICK, J.—Judgment was entered in favor of defendant January 30, 1884. Plaintiffs gave notice of intention to move for a new trial, the motion to be made on bill of exceptions. The bill was served February 12, and settled April 24, 1884. Nothing further was done in the case until October 7, 1885, when the defendant, on notice, moved the court to dismiss plaintiffs' notice of intention, on the grounds, among others, of negligence and delay on the part of plaintiffs in not prosecuting the intention to move for a new trial, and that the same had been abandoned by lapse of time. On the same day plaintiffs submitted their motion for a new trial. On the 22d of October, 1885, the court granted defendant's motion to strike out plaintiffs' notice of intention, and denied the motion for new trial. From this order an appeal was taken.

Whatever would have been within the discretion of the court in ruling on a motion (if made) to dismiss the plaintiffs' motion for a new trial on the ground of laches or failure to prosecute, the court was not justified in striking out their notice of intention. The motion for a new trial should have been granted, on the authority of *Triscony v. Brandenstein*, 66 Cal. 514. The court erred in confining the proof by plaintiffs of trespasses committed by defendant's cattle to the period of sixty days next preceding the commencement of the action.

The appeal from the judgment has been heretofore dismissed, because not taken in time. The order appealed from, viz., the order granting defendant's motion to strike out plaintiffs' notice of intention, and denying plaintiffs' motion for new trial, is reversed, and the cause is remanded.

MORRISON, C. J., and MCKINSTRY, J., concurred.

Hearing in Bank denied.

[No. 11439. Department Two.—August 27, 1886.]

SOUTHERN PACIFIC RAILROAD COMPANY, APPELLANT, *v.* W. W. TERRY, RESPONDENT.

CONTRACT FOR SALE OF LAND — ACCEPTANCE OF OFFER CONTAINED IN CIRCULAR — RAILROAD LANDS. — The action was brought to recover the possession of certain land forming part of the railroad lands of the plaintiff. The defendant settled upon the land, under the provisions of a printed circular issued by the plaintiff, inviting settlers to go upon its lands and occupy and use them until the company was ready to sell, and giving to such settlers the right to purchase on certain terms and conditions, all of which the defendant had complied with, except the completion of the purchase, which the plaintiff refused to permit. Held, that the acceptance by the defendant of the offer contained in the circular constituted a contract of sale, and established the relation of vendor and vendee between the plaintiff and the defendant, and that as the defendant was rightfully in possession, the plaintiff could not recover.

APPEAL from a judgment of the Superior Court of San Bernardino County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Curtis & Otis, and *Satterwhite & Curtis*, for Appellant.

Rowell & Rowell, and *H. M. Willis*, for Respondent.

MCKEE, J. — This is an action of ejectment. The demanded premises are a portion of the railroad lands of the Southern Pacific Railroad Company, the plaintiff in the action.

Defendant settled upon the lands under the provisions of a printed circular issued by the railroad company, inviting settlers to go upon its islands and occupy and use them until such times as it would be ready to sell, when, upon an application to buy, made to the land agent of the company, the company would sell, at prices based upon the value of the lands, "to such persons as were then in possession by occupation and cultivation or improvements." To such persons the circular declared:—

"If the settler desires to buy, the company gives him

the first privilege of purchase at the fixed price, which in every case shall only be the value of the lands, without regard to the improvements.

"It must be understood that the application of a speculator, or of a person who does not improve or occupy the lands, will not, although received first, take precedence or priority of that of the settler, whose application may perhaps be filed last of all.

"The actual settler in good faith will be preferred always, and the land will be sold to him as against every other applicant."

In due time after the issuance of the circular, the company graded its lands, and fixed the price per acre at which it proposed to sell to settlers upon the lands. The defendant was notified of the fact; and on the 22d of June, 1883, he applied to the land agent of the company to purchase the demanded premises, upon which he and his family were then residing, and which he had occupied, cultivated, and improved since 1882; and in connection with his application, he tendered the twenty per cent of the purchase price required by the circular of the company, and offered to comply in all other particulars with its terms and conditions. But the plaintiff denied his application, and refused to sell him the land "on any terms whatever."

That the company could not legally do, because the offer which it made to sell its lands to actual settlers having been accepted by the defendant, who settled upon a portion of the lands, constituted a contract of sale, and established the relation of vendor and vendee between the company and the defendant as a *bona fide* settler. (*Boyd v. Brinckin*, 55 Cal. 427.)

As vendee of the land, the defendant was therefore rightfully in the possession at the commencement of the action; and as he had offered to perform the contract between him and his vendor, and is ready and willing to perform it according to its terms, the company had

no legal right to eject him. Nor could it refuse to sell the land to him, except for good cause. (*C. P. R. R. Co. v. Mudd*, 59 Cal. 585; *Whittier v. Stege*, 61 Cal. 238.)

The company based its refusal to sell upon the ground that there were two applications made to purchase the land, which raised a contest about the right to purchase, and that contest was heard and determined by the land agent of the company against the defendant and in favor of one Randall, the contesting applicant, under the following provision of the company's circular:—

“When there are two or more applicants for the same tract, an adjudication of their respective claims will be made by the land agent, upon due notice (thirty days) given to the parties, and the right to buy at the appraised valuation will be awarded to the applicant who shall be deemed to have the most equitable claim.”

Randall had filed an application to purchase the land on the 21st of April, 1883,—two months before the filing of the defendant's application; but he had never settled upon the land, or occupied and cultivated or improved it. He founded his application upon some conveyances of the land which he had obtained in the year 1883 from the grantees of one Cram, who in the year 1882 had occupied and cultivated the land jointly with the defendant, but on or about the 1st of December, 1882, vacated and abandoned his possession in favor of the defendant, who has since exclusively occupied the land. Randall was therefore a mere applicant to purchase the land, without the qualifications required by the circular of the company, and had no equitable claim to the land, or any right to purchase it. The circular itself declared:—

“The company also wishes it to be known that a mere application to buy land, unaccompanied by actual improvement or settlement, confers no right or privilege which should prevent any actual settler from taking it, if vacant, into possession and cultivating and improving it.”

The land agent of the company had therefore no power to award to Randall the land of which the defendant was in possession as an actual settler.

We find no reversible error in the record.

Judgment and order affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 9311. Department Two.—August 27, 1886.]

**WILLIAM S. CHAPMAN, RESPONDENT, v. MARY
POLACK ET AL., APPELLANTS.**

EJECTMENT — BOUNDARIES — LAND INCLUDED IN QUARTER-SECTION — EVIDENCE TO CONTRADICT SURVEY. — The action was brought to recover the possession of certain land. The plaintiff is the owner, by title derived from the United States government, of the southeast quarter of section 13 in township 11 north, range 9 west, Mount Diablo base and meridian, and the defendant Polack is the owner of the northeast quarter of the same section. The official plat of the approved survey of the township located the premises in controversy in the northeast quarter of the section. The patent under which the plaintiff claims describes the land conveyed as the southeast quarter of the section, "according to the official plat of the survey returned to the general land-office by the surveyor-general." Held, that neither parol evidence nor a private survey was admissible to show that the premises in controversy were situated in the southeast quarter of the section.

ID. — MAP REFERRED TO IN DEED. — A map of a tract of land, having lines drawn upon it marking the boundaries and the natural objects upon its surface delineated, which is referred to in a deed containing a description of the premises therein conveyed, is to be regarded as giving the true description of the land conveyed, as much as if it was expressly recited and marked down in the deed itself.

APPEAL from a judgment of the Superior Court of Napa County, and from an order refusing a new trial.

The facts are stated in the opinion.

James F. Stuart, McClure & Dwinelle, and H. A. Powell,
for Appellants.

George A. Nourse, for Respondent.

SEARLS, C.—This is an action of ejectment to recover the southeast quarter of section 13 in township 11 north, range 9 west, Mount Diablo base and meridian.

The action was brought in the county of Sonoma, transferred to the county of Napa, and there tried by the court without a jury, and judgment rendered in favor of plaintiff, from which judgment, and from an order denying a new trial, defendants appeal.

The following are the facts and conclusions of law in the cause as found by the court:—

“ FINDINGS OF FACT.”

“ 1. At the commencement of this action, and ever since the sixteenth day of April, A. D. 1878, the plaintiff was and still is the owner in fee-simple absolute of the premises described in the complaint, being the southeast quarter of section 13 in township 11 north, range 9 west, from the Mount Diablo base and meridian, according to the United States government survey.

“ 2. At the commencement of this action the defendants were and still are in possession of the Geyser Hotel, so called, and the cottages appurtenant thereto.

“ 3. Said hotel and cottages are and then were situate and standing on said quarter-section, and are and were a part thereof. I further find, as

“ CONCLUSIONS OF LAW,”

“ 1. That plaintiff is and was at the commencement of this action entitled to the possession of the said quarter-section of land described in the complaint, with its appurtenances, including said Geyser Hotel and the cottages appurtenant thereto.

“ 2. That plaintiff is entitled to a judgment against the defendants in this action for recovery of said quarter-section of land, including said hotel and cottages, and for the costs of this action.

“ Let judgment be entered accordingly.

“ Wm. C. WALLACE, Superior Judge.”

The defendant Mary Polack is the owner of the northeast quarter of section 13 in township 11 north, of range 9 west, Mount Diablo base and meridian, according to the United States government survey.

Upon this quarter-section of land as she contends, but on the southeast quarter of the same section as plaintiff claims, defendant Polack had a hotel known as the Geyser Hotel, with certain cottages appurtenant thereto.

The whole case turned at the trial, not upon the title to the respective quarter-sections of land, for that was established beyond dispute, but upon the location of the dividing line between these quarter-sections.

If the line running through the center of section 13 from east to west, and dividing the northeast quarter from southeast quarter, runs north of the hotel and cottages, then the judgment of the court below is correct; if on the contrary that line runs south of the buildings, defendants were entitled to judgment.

There was testimony (introduced under objection) tending to show that a line drawn east and west midway between the north and south boundaries of the section runs north of the buildings, and includes them in the southeast quarter and the court below adopted this testimony as true in its findings and judgment.

Defendants, however, at the trial and on the motion for a new trial, contended: 1. That the theory of plaintiff is incorrect as a matter of fact; and 2. That the government survey has fixed the lines of demarkation and situation of the hotel and buildings, and that as thus established under the approved survey they are all in the northeast quarter of the section, and that such approved survey is conclusive and must prevail, whether right or wrong, and that to admit evidence to the contrary was error.

The defendant Forsyth was a tenant under his co-defendant, Mary Polack, the genesis of whose title to

the northeast quarter of section 13 was founded upon certain school-land warrants located in 1854 upon that and adjoining lands. The land being unsurveyed, the act of the legislature of the state of California of May 3, 1852, gave to the purchaser and locator of such warrants the right to possession until surveyed by the United States.

On the 18th of April, 1859, an act was passed under which parties holding school-land warrants were permitted to procure title. On the 1st of September, 1862, Mary Polack procured a survey of the premises to be made, and relocated the school-land warrants, which survey was approved by the surveyor-general of California, and the warrants canceled in payment for the land, and a certificate of purchase issued to her.

On the fourteenth day of January, 1868, the map of the official survey of said lands by the government of the United States was filed in the proper United States land-office, and thereafter such steps were taken, that, the land having been listed to the state of California, a patent issued to Mary Polack under date of February 7, 1882, from said state of California.

Upon the official plat of the approved survey of township No. 11 north, of range No. 9 west, Mount Diablo base and meridian, a certified copy of which is in evidence, the Geyser Hotel is platted and located in the northeast quarter of section 13.

In other words, the dividing or quarter-section line east and west through section 13, runs south of the buildings in dispute, and if conclusive gives the demanded premises to defendants.

It appears from the official report of the deputy surveyor by whom the survey was made, that township No. 11 north, range 9 west, is of such a rough, broken, mountainous character that many of its lines could not be run and its corners established by actual and direct

measurement, and that the points were in such cases established by triangulation.

The northeast corner of section 13, which section contains the demanded premises, was thus established, as also the northwest and southwest corners of the same section, and the quarter-section corner on the west line of and between sections 13 and 14. So far as we can determine from the field-notes, the southeast corner of the section and the quarter-section on the east line of section 13 were not established, except by triangulation, and the east line of section 13 was not run upon the ground.

The following are some of the principles for determining the boundaries and contents of the several sections, half-sections, and quarter-sections of the public lands under the laws of Congress:—

“ 1. All the corners marked in the surveys returned by the surveyor-general shall be established as the proper corners of sections or subdivisions of sections which they were intended to designate, and the corners of half and quarter sections not marked on the surveys shall be placed as nearly as possible equidistant from those two corners which stand on the same line.

“ 2. The boundary lines actually run and marked in the surveys returned by the surveyor-general shall be established as the proper boundary lines of the sections or subdivisions for which they were intended, and the length of such lines as returned shall be held and considered as the true length thereof; and the boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be,” etc. (R. S. U. S., sec. 2396.)

The official township plat shows the line of demarcation between the north and south half of section 13, shows Pluton Creek to run through the northeast quarter of the section, and Devil's Cañon to run in a southerly direction, and to enter Pluton Creek within said quarter-section, and locates the Geyser Hotel on the south bank of the creek, and nearly opposite the mouth of such cañon, and in said northeast quarter of the section.

It was under this survey and plat that defendant Polack purchased.

Georgie McBride, the grantor of plaintiff, subsequently, and on the ninth day of November, 1877, received a patent from the government of the United States for the southeast quarter of the same section, "according to the official plat of the survey of the said lands returned to the general land-office by the surveyor-general."

The testimony is ample to show that all the parties, until a recent period, regarded the hotel as being on the northeast quarter of the section. Georgie McBride, the grantor of the plaintiff, in making proof of her residence as a pre-emptor, testified to having resided upon the southeast quarter, except when at the Geyser Hotel, on the northeast quarter of the section.

Plaintiff, Chapman, was an applicant for the purchase of the northeast quarter of the section, and in a contest for such purchase, and in litigating between these parties and those in privity of estate with them, it is quite apparent that until a recent period the hotel property was regarded as being upon the northeast quarter of the section, as delineated upon the government plat. (*Chapman v. Polack*, 58 Cal. 555; *Chapman v. Gurnee*, 66 Cal. 266; *Chapman v. Polack*, 5 West Coast Rep. 68; *United States v. Chapman*, 5 Saw. 528.)

Under these circumstances, the question arises, Can parol testimony and private surveys be received to show that the line laid down upon the approved official plat of the township, under which and with reference to which

the parties purchased, is erroneous, and that defendant's hotel, the mouth of Devil's Cañon, and Pluton Creek are all not in the northeast quarter, but in the southeast quarter, of the section, and that the line should run north of the hotel and creek, as shown upon the plat of Von Leicht, a witness for the plaintiff.

The "field-books" of public surveys are required by law to be returned to the surveyor-general, "who shall cause therefrom a description of the whole lands surveyed to be made out and transmitted to the officers who may superintend the sales.

"He shall also cause a fair plat to be made of the townships, describing the subdivisions thereof, and the marks of the corners.

"This plat shall be recorded in books to be kept for that purpose, and a copy thereof shall be kept open at the surveyor-general's office for public information, and other copies shall be sent to the places of the sale and to the general land-office." (U. S. R. S., sec. 2395.)

By the second section of the act of Congress of May 30, 1862 (R. S. U. S., sec. 2379), the printed manual of instructions in relation to public surveys, prepared at the general land-office February 22, 1855, the instructions of the commissioner of the general land-office, and the special instructions of the surveyor-general, when not in conflict with the printed manual of instructions of the commissioner, are to be deemed a part of every contract for surveying the public lands.

The manual referred to, provides for quarter-section posts, for the division of townships into sections and quarter-sections, that the character of the surface, soil, and timber shall be noted; also all rivers, creeks, and smaller streams of water which the lines cross, all towns, villages, houses, cabins, and other improvements.

These and a multitude of other objects are required to be noted. (1 Lester's Land Laws, 703.)

From the *data* furnished by the surveyor, the plats

are prepared. One of the objects of the manual and law was to simplify the mode of disposing of the public lands, so that without cumbering patents with descriptive field-notes the plats of the surveys should afford all necessary information to purchasers, and at the same time afford a convenient and certain description by reference of the land conveyed; and these official plats are made the basis of all sales and selections of the public lands, and are solely referred to in the usual patents to show what lands are patented. (*Bates v. Ill. C. R. R. Co.*, 1 Black, 207.)

By the plats of public surveys, lands must be identified and boundaries ascertained in all cases of the kind. (*Brown's Lessee v. Clements*, 3 How. 671; *Gazzam v. Lessee of Phillips*, 20 How. 375.)

It is true that the laws of the United States do not in terms provide for the location of quarter-section stakes, or for the survey of the interior lines of the sections, but under the manual and instructions it may be done, and in fact is most usually done, as appears by the evidence furnished by the plats.

It is with reference to the lines so run and the corners established that section 2396 of the Revised Statutes, quoted *supra*, provides that "all the corners marked in the surveys . . . shall be established as the proper corners of sections or subdivisions of sections," etc., and the boundary lines actually run and marked in the surveys returned by the surveyor-general shall be established as the proper boundary lines of the sections or subdivisions for which they were intended," etc.

From these provisions, it appears that the lines of subdivisions, as well as of sections, are established by law.

The selection under which the defendant's purchase was made was based upon the official township plat of the public survey as required by the circular of instruc-

tions of the commissioner of the general land-office of August 6, 1847. (1 Lester's Land Laws, 508.)

Where a map or plan of a tract of land, with lines drawn upon it marking the boundaries, and with the natural objects upon its surface laid down, is referred to in a deed containing a description of the premises therein conveyed, this map or plan is to be regarded as giving the true description of the land conveyed, as much as if it was expressly recited and marked down in the deed itself. (*Vance v. Fore*, 24 Cal. 436; *Mayo v. Mazeaux*, 38 Cal. 442; *Serrano v. Rawson*, 47 Cal. 52; *Black v. Sprague*, 54 Cal. 266.)

As was said in *Vance v. Fore, supra*, "the map may be regarded as a daguerreotype of the land which the grantor intended to convey."

All the objects represented upon a plan are to have the same effect as they would if brought into the deed by verbal description. (*Thomas v. Patten*, 13 Me. 333.)

How, then, stands the case? Defendant was the owner of a house and out-buildings known as the Geyser Hotel property.

The approved official plat of the government of the United States showed this property to be upon the northeast quarter of section 13, with the line of demarkation between this and the southeast quarter of the section plainly laid down, and running south of the premises owned by her.

She purchased the northeast quarter of the section. Plaintiff's grantor subsequently purchased from the government the southeast quarter, and the patent refers to the same plat and surveys according to it, as hereinbefore mentioned.

Under such circumstances, we are of opinion the line as designated upon the plat, and running south of defendant's hotel, whether accurate or not, is to be deemed and taken as the true division line between the north and southeast quarters of section 13, and that

neither a private survey nor parol evidence was admissible to show that the line should in fact run north of defendant's hotel.

By the act of the government, such line had been created as a dividing line between the quarters of the section. (*Robinson v. Forrest*, 29 Cal. 325.) And as to persons who had purchased and acquired vested rights with reference to it, it is to be treated as correct. (8 Opinions Attorney-General U. S. 431.)

1. It follows from this view that as plaintiff introduced in evidence the plat which, together with the patent to the southeast quarter, established this line and his northern boundary thereat, the motion for a nonsuit should have been granted.

2. That the evidence of the private survey and the plat of Von Leicht, in contradiction of the plats of the surveys of the United States, were erroneously admitted.

The plan resorted to for ascertaining the position of the quarter-section stake on the east line of the section was the true method of determining the point in cases where the position of the quarter-section lines are not laid down, and their *locus* fixed; but when, as in this case, the position of the line has been fixed, and rights have vested with reference to it as established, the position for the quarter-section post is also determined as being at the end of the established line.

The judgment and order denying the motion for a new trial should be reversed, and a new trial had.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded for a new trial.

Hearing in Bank denied.

[No. 11211. Department Two.—August 27, 1886.]

CENTRAL PACIFIC RAILROAD COMPANY, APPELLANT, *v.* ROBERT CREED. A. D. LOGAN, RESPONDENT.

JUDGMENT — DEFECTS AND IRREGULARITIES. — Mere defects or irregularities in the process or proceedings, against a party not objecting to them, do not affect the validity of a judgment in the case, or the rights of the parties to it; and a plaintiff in whose favor such a judgment is entered cannot question it.

FORECLOSURE SALE — SETTING ASIDE — INADEQUACY OF PRICE. — A foreclosure sale will not be set aside for mere inadequacy in the price for which the property was sold.

ID. — SURPRISE — NEGLIGENCE — OFFER TO RETURN PURCHASE PRICE. — Such a sale, if fair and regular upon its face, will not be set aside on the ground of surprise, unless the party claiming to have been surprised was without fault or negligence, and promptly offered to return the purchase-money.

ID. — CIRCUMSTANCES NOT CONSTITUTING SURPRISE. — The sale in question was had on the 22d of December, 1884, under a judgment rendered in favor of the plaintiff on the 10th of October, 1884. The plaintiff knew of the time and place of sale, but neglected to give any instructions in reference thereto until the day preceding the sale, when it telegraphed to its agent and wrote the sheriff offering to purchase the property for the amount of the judgment and costs, and instructing them to make a bid to that effect at the sale. By reason of atmospheric conditions, neither the telegram nor letter was received by the parties to whom they were sent until after the sale. The sale was made to the respondent for a less price than that offered by the plaintiff. The plaintiff received the purchase-money, and kept it for five months, when, without offering to return the money, it moved to set aside the sale on the ground of surprise. *Held*, that the motion was properly denied.

APPEAL from a judgment of the Superior Court of Colusa County, from an order refusing to set aside the judgment, and from an order refusing to set aside an execution sale.

The facts are stated in the opinion of the court.

Joseph D. Redding, for Appellant.

John T. Harrington, for Respondent.

MCKEE, J.—In this case, the plaintiff in the action had appealed from a judgment in its favor, and from an order of refusal to set aside the judgment and an execution sale of land thereunder.

The judgment appealed from was entered on the 10th of October, 1884, against the defendant, Creed, upon a default entered against him for not answering. By its terms, the judgment provided for the sale of a tract of land containing 159 acres to pay the sum of \$2,995, which the court found to be due and owing by the defendant to the plaintiff upon a contract for the purchase of the land. Under the judgment the land was sold at sheriff's sale on the 22d of December, 1884, to A. D. Logan.

Seven months after the rendition of the judgment, and five months after the sale of the land, the plaintiff's attorney applied, upon notice to the purchaser, to set aside the judgment, upon the ground "that the summons in the action was defective and irregular," and set aside the sale upon the ground "that it was made to the prejudice and exclusion of the plaintiff."

The court properly denied the application to set aside the judgment. Mere defects or irregularities in the process or proceedings of a judgment, against a party who does not object to them, do not affect the validity of the judgment or the rights of the parties to it. A plaintiff in whose favor such a judgment is entered has no right to question it. As to him, it is either valid or void. If valid, it is a final determination of his rights. If void, it does not affect his rights, and he may proceed to enforce them by any available remedy.

In the proceedings instituted by the plaintiff, the court had jurisdiction of the subject-matter of the action and of the parties; the judgment pronounced in the action was therefore valid; its validity is unquestioned by the defendant; as to him it stands in full force, unreversed and unappealed from; it is therefore final and conclusive.

as to the parties; and the plaintiff, at whose instance it was taken, has no right to appeal from it. One in whose favor a valid judgment has been rendered cannot be considered "a party aggrieved by it." (*Ely v. Frisbie*, 17 Cal. 250; *Sleeper v. Kelly*, 22 Cal. 456.)

The sale of the land took place in Colusa on the 22d of December, 1884. The plaintiff knew of the time and place of sale, and one of its agents, who resided in Colusa, on the 20th of December, 1884, sent to the plaintiff's attorney a telegram as follows:—

"COLUSA, CAL., Dec. 20, 1884.

"J. D. REDDING, 302 Montgomery Street, San Francisco: Sheriff wants instructions about sale Creed land next Monday. J. W. GOAD."

The telegram was seasonably received, and on the same day the attorney at San Francisco in answer telegraphed:—

"DECEMBER 20, 1884.

"J. W. GOAD, Colusa, Colusa County, Cal.: If no bidders, company offers amount judgment and costs.

"JOSEPH D. REDDING."

At the same time the attorney wrote to the sheriff a letter as follows:—

"SAN FRANCISCO, Dec. 20, 1884.

"SHERIFF OF COLUSA COUNTY, Colusa, Cal., — *Dear Sir:* I have received a dispatch from J. W. Goad, Esq., of Colusa, stating that the sheriff desires instructions for the sale of Creed land next Monday. I have just telegraphed Mr. Goad that if there are no bidders at the sale that the company offers the amount of judgment and costs, to wit, \$2,995 judgment and \$115 costs. You are respectfully requested by the company to make the above-named bid, they being expressly allowed to do so by the terms of the decree herein. Yours respectfully,

"JOSEPH D. REDDING,
"Attorney C. P. R. R. Company."

No representative of the plaintiff attended the sale; but there were bidders present, and the land was struck off to one of them — A. D. Logan — for \$1,092. As purchaser, Logan paid the money to the sheriff, and the sheriff forwarded the money to the attorney of plaintiff by letter as follows: —

“ COLUSA, CAL., Jan. 3, 1885.

“ JOSEPH D. REDDING, Attorney at Law, — *Dear Sir:*
Inclosed find check for \$1,027.40, proceeds of sale in the case of C. P. R. R. Company against Robert Creed. Please acknowledge receipt, and forward the inclosed receipt to me. Your letter of advice was not received until after the sale was made to A. D. Logan. Mr. Goad says he did not receive the telegram you refer to in your letter. Yours truly,

M. DAVIS, Sheriff.”

Upon receiving the money, the attorney forwarded the following receipt: —

“ \$1,027.48. COLUSA, Jan. 5, 1885.

“ Received from M. Davis, sheriff of Colusa County, one thousand and twenty-seven 48-100 dollars, in United States gold coin, being the amount of sale of real estate in the case of *Central Pacific Railroad Co. v. Robert Creed*, Superior Court, County of Colusa, after deducting sheriff's costs and disbursements, amounting to \$64.52.

“ JOSEPH D. REDDING, Plaintiff's Attorney.”

The purchaser at the sale received from the sheriff a certificate of purchase; the sale was therefore complete. By the certificate, the purchaser became vested with an inchoate right to the land, subject to be defeated by redemption according to law, and by the receipt of the purchase-money the judgment became satisfied *pro tanto*.

For five months after the sale the plaintiff never questioned its validity, but at the end of that time, without offering to pay back the purchase-money, which was received in satisfaction of the judgment, the plaintiff moved to set aside the sale upon an affidavit which

states: 1. That the land which was sold at seven dollars per acre was worth twenty dollars per acre; and 2. "That at the time said letters and telegrams being sent, the means of communication between Williams, the point nearest Colusa on the railroad line, and Colusa were very imperfect, and the roads nearly impassable; that the telegraph wires were down between San Francisco and Colusa, and hence the plaintiff by the ordinary and customary means of communication between these points was prevented from giving instructions to the sheriff and to J. W. Goad, the representative of the railroad (plaintiff) in Colusa."

Mere inadequacy of price is not sufficient to invalidate a foreclosure sale. (*Smith v. Randall*, 6 Cal. 47; S. C., 65 Am. Dec. 475; *McCormick v. Malin*, 5 Blackf. 509; 2 Perry on Trusts, 602.) The fact of inadequacy has some significance in connection with proof of unfair practices at the sale, or of surprise which prevented a party to the judgment to be enforced by the sale from attending, to his prejudice.

It is admitted that there were no unfair practices in connection with the sale; the sale was in all particulars regular and valid. The surprise for which a court will set aside proceedings fair and regular on their face which have resulted in vesting rights to real property in a purchaser must be a legal surprise, without fault or negligence of the party who claims to have been surprised; a court of equity does not assist a party who has lost his rights through his own negligence. (*Hendrickson v. Hinckley*, 17 How. 443.) And the party surprised must act promptly, and offer to return the purchase-money. There would be no equity in allowing him to set aside the sale five months after it took place, and keep the purchase-money.

Besides, the circumstances stated in the affidavit of the plaintiff do not constitute legal surprise.

The plaintiff knew of its own judgment, and of the

legal means provided for its enforcement, and of the time and place of the sale of the property for its enforcement. Knowing these things, it was its duty to take such steps as were necessary to be represented at the sale. That it could have done at any time while the proceedings were *in fieri*, by sending instructions to its agent, who was on the ground ready to act. It was its own fault that it postponed doing that or taking any other course until the atmospheric condition of some twenty-four hours before the sale may have interfered with the communications between the plaintiff and its agent before the hour of sale. And when, with a full knowledge of all the facts connected with the sale, it received the purchase-money, and elected to consider the sale valid, it ought not to be heard five months afterwards to say that it was surprised. (*Dewey v. Frank*, 62 Cal. 343.)

The court properly denied the motions made by the plaintiff.

Judgment and orders affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied.

[No. 11500. Department One.—August 28, 1886.]

EMIL HARRIS, RESPONDENT, *v.* A. P. MORE, APPELLANT.

PUBLIC OFFICER — DEPUTY SHERIFF — AGREEMENT TO COMPENSATE — PUBLIC POLICY. — An agreement to compensate a deputy sheriff for procuring evidence which would lead to the conviction of a person implicated in a certain crime is not contrary to public policy if the crime was committed and the trial had in a county other than that in which the deputy sheriff was an officer.

APPEAL from a judgment of the Superior Court of Santa Barbara County, and from an order refusing a new trial.

The action was brought to recover for certain services performed under an agreement stated in the opinion. The further facts are stated in the opinion of the court.

Thomas McNulta, A. A. Oglesby, and W. E. Shepherd, for Appellant.

W. T. Williams, and W. C. Stratton, for Respondent.

MYRICK, J.—The defendants executed an agreement in writing to pay moneys to any person furnishing evidence which would lead to the conviction of persons implicated in the commission of a crime. The agreement was delivered to the plaintiff. It contained a clause agreeing to pay plaintiff certain expenses in investigating the matter of the offense. The plaintiff rendered services in regard to discovering evidence and causing the same to be produced at the trial. The plaintiff was deputy sheriff of Los Angeles County, and the offense was committed and the trial had in another county.

As the plaintiff had no legal duty to perform, by virtue of his office of deputy sheriff, in regard to discovering the evidence and causing it to be produced, having no writ to execute, and the offense having been committed and the trial had out of his county, we do not think the policy of the law forbade his receiving the compensation. It was not compensation for the performance of any duty enjoined upon him by law.

No error appears in the transcript.

Judgment and order affirmed.

McKINSTRY, J., and MORRISON, C. J., concurred.

Hearing in Bank denied.

[No. 11353. Department One.—August 28, 1886.]

THE PEOPLE, RESPONDENT, *v.* THOMAS J. CLUNIE,
APPELLANT.

REVENUE — ACT OF MAY 17, 1861 — CITY OF SACRAMENTO. — Under the act of April 25, 1863, incorporating the city of Sacramento, the revenue act of May 17, 1861, became a part of the city charter so far as concerns the mode of assessing, levying, and collecting the municipal taxes.

ID. — REPEAL OF ACT. — The revenue act of May 17, 1861, so far as its operation as a general law is concerned, was repealed by section 18 of the Political Code; but so far as it was incorporated into and became a part of the charter of the city of Sacramento, it was continued in force.

ID. — ASSESSMENT OF CITY LOTS. — The assessment in question held invalid on the authority of *Terrill v. Groves*, 18 Cal. 149, the point there decided being that city lots must be separately assessed, and a separate valuation placed on each.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The action was brought to recover the amount of certain delinquent taxes. The property assessed was situated in the city of Sacramento, and the taxes were levied for municipal purposes for the fiscal years 1882-83. The assessment described the property as consisting of several lots, giving their numbers in a designated block, and valued them as a whole. The further facts are stated in the opinion of the court.

Robert T. Devlin, for Appellant.

John T. Carey, and *H. L. Buckley*, for Respondent.

Ross, J. — The main question argued in this case and which we are urged to decide is, what, if any, law is in existence authorizing the city of Sacramento to assess, levy, and collect municipal taxes. The charter of the city is found in the act of the legislature approved April 25, 1863. (Stats. 1863, p. 415.) In respect to city taxes, section 49 of that act provides: —

"The city taxes shall be levied, assessed, and collected under the provisions of an act entitled 'An act to provide revenue for the support of the government of this state,' approved May 17, 1861, except as herein otherwise provided. The board of trustees shall have and are hereby possessed of the same powers as the board of supervisors in said act, and the city assessor the same as county assessor, the city tax collector the same as county tax collector, the city auditor the same as county auditor, and the city attorney shall perform all the duties devolved by said act upon district attorneys, and shall be entitled to the same fees and compensation for his services."

The effect of this provision of the charter was to incorporate into it the provisions of the act of May 17, 1861, in so far as concerns the mode and manner of assessing, levying, and collecting taxes, except as by the charter otherwise specially provided. (*Spring Valley Water Works v. San Francisco*, 22 Cal. 434.) It is claimed, however, that the act of May 17, 1861, was repealed upon the adoption of the Political Code, which established another and different system for the assessing, levying, and collection of state and county taxes. Sections 18 and 19 of that code provide as follows:—

"Sec. 18. No statute, law, or rule is continued in force because it is consistent with the provisions of this code on the same subject; but in all cases provided for by this code all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this code, unless expressly continued in force by it, are repealed and abrogated. This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in this code provided; nor does it affect any private statute not expressly repealed.

"Sec. 19. Nothing in either of the four codes affects any of the provisions of the following statutes, but

such statutes are recognized as continuing in force notwithstanding the provisions of the codes, except so far as they have been repealed or affected by subsequent laws:—

“1. All acts incorporating or chartering municipal corporations, and acts amending or supplementing such acts.

“2. All acts consolidating cities and counties, and acts amending or supplementing such acts.”

There is no doubt that section 18 of the Political Code repealed the act of May 17, 1861, in so far as its operation as a general law of the state is concerned, but it is equally clear that in so far as it was incorporated into and became a part of the charter of the city of Sacramento, it was continued in force. (*Spring Valley Water Works v. San Francisco, supra; Wood v. Hustis*, 17 Wis. 416.) There is nothing in the case of *Savings and Loan Society v. Austin*, 46 Cal. 415, to the contrary. One of the points made in that case was to the effect that so much of the contested tax as was sought to be collected for city and county purposes was void because not levied in accordance with what is known as the Consolidation Act and the amendments thereto,—the argument being that the general revenue system provided in the Political Code was not applicable to the city and county of San Francisco. After quoting sections 18 and 19 of the Political Code, the court said that if they stood “alone and unexplained, it would be difficult to escape the conclusion that it was intended to continue in force the Consolidation Act and all the amendments thereto, including the machinery therein provided for the levying and collection of city and county taxes.” But the court proceeded to point out that the legislature which adopted the codes manifested its intention that the general revenue system therein provided should apply to San Francisco by passing a special act, entitled, “An act to enable the city and county of San Francisco to conform to so much of the

Political Code as relates to the public revenue." (Stats. 1871-72, p. 773); and the court gave effect to that intention. But no such intention was manifested in respect to the city of Sacramento. So far as concerns that city, sections 18 and 19 of the Political Code stand "alone and unexplained." That being so, it is impossible to resist the conclusion that it was intended to continue in existence the charter of the city, including the machinery therein provided for the assessing, levying, and collection of municipal taxes. That machinery, as has been seen, is to be found in the act of May 17, 1861.

An examination of the record, however, shows that the assessment involved in this case was not made in accordance with the requirements of that statute. A similar assessment was held void in *Terrill v. Groves*, 18 Cal. 149, on the authority of which case the judgment and order must be reversed. A different state of facts existed in the case entitled *People v. Morse*, 43 Cal. 541.

Judgment and order reversed, and cause remanded.

MCKINSTRY, J., and MYRICK, J., concurred.

[No. 11308. Department Two.—August 28, 1886.]

MARIA BODILLA LOUVALL, RESPONDENT, v.
HELEN D. GRIDLEY, ADMINISTRATRIX, ETC., OF G.
W. GRIDLEY, DECEASED, ET AL., APPELLANTS.

QUIETING TITLE — ESTATE OF DECEDENT — PERSONAL REPRESENTATIVE AND HEIRS ARE PROPER PARTIES. — In an action to quiet title to land against the estate of a deceased person, both the personal representative of the decedent and his heirs at law are proper parties defendant.

ID. — AMENDMENT — JOINDER OF PERSONAL REPRESENTATIVE. — Where a general leave to amend has been obtained, the plaintiff has a right to join other proper parties as defendants without special permission so to do.

ID. — CHANGE OF NATURE OF ACTION — MISJOINDER OF CAUSES OF ACTION. — The action was brought to quiet title to certain land. The original complaint alleged that the plaintiff's devisor was the owner of the land, and conveyed the same by a deed absolute in form

to one Gridley in 1866; that the deed was intended as a mortgage to secure an indebtedness, which had subsequently been fully paid; that Gridley promised to reconvey the property, but died without having done so. It was further alleged that the deed constituted a cloud on the title of the plaintiff. The widow and children of Gridley were made parties defendant. The plaintiff subsequently filed an amended complaint, making the administratrix of the estate of Gridley also a defendant; and further alleging that the plaintiff's devisor remained in the actual, open, notorious, uninterrupted, and exclusive possession of the land, claiming the same as his own, and adversely to every other right, from the time of the execution of the deed until his death in 1883. The prayer was for a decree establishing the ownership of the plaintiff to the land, and that the defendants had no right or title therein; that the deed be declared a mortgage and canceled of record, and that the title of the plaintiff be quieted. *Held*, on demurrer and motion to strike out, that the amended complaint did not materially change the nature of the action, and that several causes of action were not improperly joined.

IId. — STATUTE OF LIMITATIONS — IMMATERIAL ISSUE — FINDING.— The defendants pleaded section 337 of the code of Civil Procedure in bar of the action. *Held*, that the section did not apply, and that no finding on the subject was required.

APPEAL from a judgment of the Superior Court of Butte County, and from an order refusing a new trial.

The facts are stated in the opinion.

H. V. Reardon, for Appellants.

Hundley & Gale, and *R. C. Long*, for Respondent.

BELCHER, C. C.—It was alleged in the original complaint that the plaintiff's devisor was the owner of a quarter-section of land, and conveyed the same by a deed absolute in form to George W. Gridley in 1866; that the deed was intended as a mortgage to secure the sum of one hundred dollars, and that the debt was fully paid in 1868; that Gridley promised to reconvey the property, but died without having done so, and that the deed is now a cloud upon the plaintiff's title. The widow and children of Gridley were made parties defendant.

By leave of the court, the plaintiff filed an amended complaint, making the administratrix of the estate of Gridley also a defendant, and setting forth the facts

constituting her cause of action somewhat more fully than they were set forth in the original complaint.

Among other things, it was alleged that the plaintiff's devisor remained in the actual, open, notorious, uninterrupted, and exclusive possession of the land, claiming the same as his own, and adversely to every other right, from the time of the execution of the deed in 1866 until his death in 1883. And the prayer was that it be adjudged and decreed that the plaintiff was the owner of the property, and that the defendants had no right, title, or interest in or claim upon the same or any part thereof; that the deed to Gridley was intended to be a mortgage only, and was fully paid and satisfied during his life; that a commissioner be appointed to enter and indorse upon the record of the deed "that said instrument was intended as a mortgage, and had been fully paid and satisfied"; and that plaintiff's title be quieted as against the defendants.

The defendants moved to strike out the amended complaint, upon the ground that the administratrix of the estate of Gridley was made a defendant without permission of the court having been obtained for that purpose; and upon the further ground that the nature of the action and the relief prayed for had been materially changed.

They also demurred to the complaint upon the ground that there was a misjoinder of parties defendant, and upon the further ground that two causes of action, one to quiet title, and the other to declare a deed a mortgage, were improperly united, and not separately stated.

The court denied the motion to strike out, and overruled the demurrer, and these rulings are assigned as error.

We think the rulings were right. The administratrix was a proper party to the action, and the plaintiff, having obtained leave to amend generally, had a right to make her a party without any special permission to do so. The heirs at law were proper, if not necessary,

parties, and there was no misjoinder when all were brought in. The nature of the action was not materially changed. In both the original and amended complaints, the purpose was to remove a cloud cast upon the plaintiff's title by the deed of 1866, which was alleged to have been intended only as a mortgage.

Some probative facts were unnecessarily stated in the amended complaint, but they served only, if established, to sustain the plaintiff's contention. They did not constitute a separate cause of action, and the complaint was not subject to demurrer because two causes of action were improperly joined.

The defendants also insist that the evidence did not justify the decision. A sufficient answer to this is found in the fact that there was testimony tending strongly to support the decision, and the testimony the other way, at most, created only a conflict. In such a case, as is well settled, this court never interferes with the judgment of the court below.

The defendants pleaded in bar of the action section 337 of the Code of Civil Procedure. That section, provides that "an action upon any contract, obligation, or liability founded upon an instrument in writing, executed in this state, must be commenced within four years after the cause of action accrued. The court failed to find upon the issue presented by this plea, and this failure is assigned as error.

The action was not brought to enforce a contract, obligation, or liability founded upon an instrument in writing, and the issue sought to be presented was wholly irrelevant and immaterial. In *Chipman v. Morrill*, 20 Cal. 130, the court, by Field, C. J., said "that the statute by the language in question refers to contracts, obligations, or liabilities resting in or growing out of written instruments, not remotely or ultimately, but immediately; that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties

who are sought to be charged, in favor of those who seek to enforce the contracts, obligations, or liabilities. The construction would be the same if the word "founded" was omitted, and the statute read "upon any contract, obligation, or liability upon an instrument of writing."

As the issue tendered was immaterial, a failure to find upon it was not an error. (*Knowles v. Searle*, 64 Cal. 377; *McCourtney v. Fortune*, 57 Cal. 617.)

The judgment and order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 11307. Department Two.—August 28, 1886.]

ANTONIO GARABALDI, RESPONDENT, *v.* T. F. SHATTUCK, APPELLANT.

GRANTOR AND GRANTEE — ADVERSE POSSESSION OF GRANTOR — SUBSEQUENTLY ACQUIRED TITLE.—A grantor of land who remains in the adverse possession thereof for the period prescribed by the statute of limitations obtains a title as against his grantee, and a title subsequently acquired by him inures to his benefit, and not to the benefit of the grantee.

APPEAL from a judgment of the Superior Court of Butte County.

The facts are stated in the opinion.

H. V. Reardan, for Appellant.

Hundley & Gale, for Respondent.

BELCHER, C. C.—This is an action to quiet title to certain land in Butte County.

The plaintiff had judgment, and the defendant appealed.

It appears from the findings that on the twenty-sixth day of February, 1866, one Richard F. Floyd was in possession of the land in question,— it being then public land of the United States,— and on that day, on his own motion and without consideration of any kind, made a deed purporting to convey it in fee to the defendant. The deed was acknowledged and recorded, but the grantee did not take possession under it. On the contrary, Floyd remained in possession; and from that time until April, 1885, he held the actual, open, notorious, exclusive, peaceable, and adverse possession of the premises, and of every part thereof, claiming the same in his own right, and adversely to all the world, and especially as against the defendant.

In May, 1881, Floyd obtained the title to a part of the land by patent from the United States, and in June, 1885, he obtained the title to the balance of it by deed from the Central Pacific Railroad Company. Floyd conveyed the land to the plaintiff, and the plaintiff thereupon commenced this action.

It is now claimed for the defendant, appellant here, that the titles acquired by Floyd in 1881 and 1885 immediately passed to and vested in the defendant by reason of his deed of 1866.

We do not think this claim can be maintained. There can be no doubt that a grantor, even with a covenant of warranty, may after his deed is delivered take adverse possession of the property conveyed, and if his possession is allowed to continue during the period prescribed by the statute of limitations, obtain a title as against his grantee. (*Franklin v. Dorland*, 28 Cal. 180; S. C., 87 Am. Dec. 111; *Sherman v. Kane*, 86 N. Y. 57; *Traip v. Traip*, 57 Me. 268; *Smith v. Montes*, 11 Tex. 24.)

An adverse possession of land for the period of time prescribed by the statute not only bars the remedy, but practically extinguishes the right of the party having the true paper title, and vests a perfect title in the ad-

verse holder. (*Arrington v. Liscom*, 34 Cal. 365; *Cannon v. Stockman*, 36 Cal. 535; *Leffingwell v. Warren*, 2 Black, 605.)

When Floyd obtained his title in 1881, he had been in the adverse possession of the premises for fifteen years, and the title, whatever it was, conveyed by the deed of 1866 was extinguished. He had again, as against all the world except the United States, become the owner of the property as completely as he would have been if the defendant had reconveyed it to him. But if the defendant had reconveyed it to him, would any one contend that the new title at once passed to the defendant notwithstanding his deed?

We think not. The true rule is, that an after-acquired title passes to a prior grantee only so long as the prior grantee has some estate, interest, or claim in or to the property granted. When he has ceased to have any estate in the property, he has nothing to be fed by the new title, and so cannot claim it.

Manley v. Howlett, 55 Cal. 94, is not in conflict with what has been said. In that case, plaintiff sued in ejectment, and to establish his title relied upon a patent issued less than five years before the commencement of his action. The defendant pleaded the statute of limitations, but it was correctly held that the statute did not begin to run until the issuance of the patent.

The judgment should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 11095. Department Two.—August 28, 1886.]

ISAIAH RENDELL, RESPONDENT, *v.* J. H. SCOTT ET AL., APPELLANTS.

SALE OF LAND — SETTING ASIDE — FALSE REPRESENTATIONS — MATTERS OF OPINION.—A sale of land will not be set aside at the instance of the vendee on account of false representations by the vendor of mere matters of opinion as to its value and productivity.

APPEAL from a judgment of the Superior Court of Sacramento County.

The action was brought to recover an installment of the purchase price of certain land sold by the plaintiff to the defendants. The further facts are stated in the opinion of the court.

W. H. Beatty, S. C. Denson, and H. A. Carter, for Appellants.

Armstrong & Hinkson, for Respondent.

THE COURT.—The defendants by their cross-complaint sought to have set aside as obtained by fraud a contract by which the defendants had agreed to purchase a tract of land from plaintiff. The alleged fraud consisted of certain representations by which the defendants were induced to enter into the contract for the purchase of the land. The cross-complaint was demurred to, and the demurrer was sustained.

It is apparent to us that the matters alleged as constituting the fraud were matters of opinion rather than of facts. It was certainly matter of opinion when the plaintiff stated that the land was the best ranch in Ione Valley, and was very rich and productive, and would produce fifty bushels of wheat to the acre; that a portion was good alfalfa land, and that another portion was rich in mineral deposits; and the other matters alleged may well be classed under the head of matters of opinion

rather than a false representation of facts. There is no averment which excludes the idea of personal inspection by the purchaser.

In such a case, the purchaser should exercise his own judgment, and is not entitled to relief in equity.

Judgment affirmed.

[No. 20197. In Bank.—August 28, 1886.]

THE PEOPLE, RESPONDENT, *v.* SAM LUNG, APPELLANT.

GAMING AT TAN — CARRYING ON GAME — INFORMATION.—Under section 330 of the Penal Code, an information for carrying on and conducting a game of tan need not allege that the defendant did so as an owner or employee, nor is evidence to that effect necessary to sustain a conviction of the offense.

ID. — ARTICLES USED AT GAME — EVIDENCE — RES GESTÆ.—The articles used in carrying on and conducting the game are part of the *res gestæ*, and admissible in evidence in illustration of the nature of the game.

ID. — IDENTIFICATION OF GAME.—On the trial, a witness described the game which he saw the defendant conducting. Another witness thereupon testified that the game described was tan. *Held*, that the evidence was admissible.

ID. — JUDGMENT — RECITAL OF OFFENSE.—A recital in the judgment that the defendant was found guilty of the offense of gaming at tan as charged in the information is equivalent to a recital that the defendant was found guilty of gaming at tan by carrying on and conducting the same for money or its equivalent.

CRIMINAL LAW — EXCLUSION OF WITNESSES FROM COURT-ROOM.—The exclusion of witnesses from the court-room is within the discretion of the court.

APPEAL from a judgment of the Superior Court of Monterey County, and from an order refusing a new trial.

The facts are stated in the opinion.

Geil & Morehouse, for Appellant.

Attorney-General Marshall, and *R. M. F. Soto*, for Respondent.

FOOTE, C. — The defendant, Sam Lung, was accused by information of having carried on and conducted the game of tan for money, etc.; he was convicted as charged by a jury, and from the judgment against him, and an order refusing a new trial, he appealed.

As we understand section 330 of the Penal Code, it means that every person whatsoever who deals, plays, or carries on, or opens or causes to be opened, or who conducts, certain games therein mentioned, "for money, checks, credit, or any other representative of value, is punishable by fine of not less than two hundred nor more than one thousand dollars, and shall be imprisoned in the county jail until such fine and costs of prosecution are paid, such imprisonment not to exceed one year"; and that "every person who plays or bets at or against any of said prohibited game or games is guilty of a misdemeanor."

That being so, it was not material that the information (which charged that the defendant "did willfully and unlawfully carry on and conduct a certain game of *tan*, then and there played for money," etc.) should have stated that he did so as *employee* or *owner* of such game.

The offense defined in the first clause of the section *supra* is not limited to those who, as *owners* or *employees*, *conduct* or *carry on* any of the prohibited games for money; it embraces all persons who carry on or conduct such games, whether as owners, employees, or in any other capacity, but it does not include any one who plays or bets at or against such games, they being included in the second clause of the said section.

The legislature did not intend to declare by the first clause that no one except *owners* or *employees* connected with such games should be punishable thereunder; it meant to include all persons who might thereafter commit the acts there prohibited. And the demurrer to the information was properly overruled.

It was unnecessary, in order to convict the defendant of

the offense charged, that it should have appeared in evidence that he was either an *owner* or *employee* of a *tan* game, conducting or carrying on the same for money or its equivalent; nor was it necessary that the depositions taken on the preliminary examination should have evidenced the character which the defendant then and there assumed.

If it was proved before the committing magistrate, and afterward before the trial court, that he was a person carrying on or conducting such a game for money or its equivalent, it was sufficient to warrant his being tried by the Superior Court, and convicted by the jury. And therefore the court did not err in refusing to set aside the information on any ground covered by the motion therefor.

It was within the discretion of the court to exclude or not witnesses from the court-room. (*People v. Garnett*, 29 Cal. 625; *Greenl. Ev.*, sec. 462.)

The introduction in evidence of the articles used in carrying on and conducting the game of *tan*, called the *lay-out*, was admissible to aid in illustrating the kind of game alleged to have been carried on, etc., and was a part of the *res gestæ*.

The testimony of the witnesses Carrow and Nesbitt was not expert testimony in the proper sense of such term. One of them was called, who testified in effect that he saw the defendant conducting a certain game for money or its equivalent, and described it before the jury; the other witness was called, who had illustrated to him the game which was shown before the jury. He said, "That is the game of *tan*."

This did not take away from the jury the determination of the material thing at issue, that is, whether or not the defendant had carried on or conducted such a game for money as that illustrated by one witness, and identified as being a certain kind of game by another witness.

A given individual may have witnessed the playing of some ordinary game of cards for money but twice or thrice in his life, and heard the players denominate it by its proper name, and yet he may be able readily (when he has such a game as he formerly observed illustrated before him) to declare that such game is the game he formerly saw played; and in such recollection or identification no special skill or science is a necessary ingredient. And such evidence is entirely proper, and may sometimes be all that can be had in a given case upon a special point. The evidence given was competent and pertinent to the issue; of its force the jury alone were the judges.

We do not think that the court in its charge assumed and declared to the jury that the game conducted or carried on by the defendant *was the game of tan*, or took away from the jury the determination of the question as to whether or not it was the said game; and in all other respects, we are of opinion that such charge was correct, fair, and easily comprehended by those to whom it was addressed. And the instructions asked for by the defendant were properly refused.

The recital in the entry of the judgment was, that "the defendant, by the verdict of a jury, was on January 21, 1886, found guilty of the offense of gaming at tan, as charged in the information." This meant that the defendant was by the verdict of that jury found guilty of gaming at tan, by carrying on and conducting the same for money or its equivalent, and therefore the judgment sentenced the defendant for the offense of which he was tried and convicted, and was in no way erroneous or prejudicial to his rights.

From a careful examination of the record, we are of opinion that the judgment and order should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 9675. In Bank.—August 28, 1886.]

S. B. DAVIDSON, RESPONDENT, *v.* THOMAS DE-VINE, APPELLANT.

JUDGMENT — VERDICT — NOMINAL DAMAGES. — A judgment for one cent damages, entered upon a special verdict in favor of the plaintiff for "nominal damages," if in other respects proper, will not be set aside for uncertainty in the verdict.

INJUNCTION SUIT — COSTS. — In an injunction suit, where a perpetual injunction is awarded, the allowance of costs to the plaintiff is within the discretion of the court.

APPEAL from a judgment of the Superior Court of Sierra County.

The facts are stated in the opinion.

John Gale, for Appellant.

S. B. Davidson, and *M. Farley*, for Respondent.

SEARLS, C. — This was an action to recover damages for an alleged trespass upon a mining claim, and for an injunction.

Plaintiff had judgment for one cent damages, costs of suit, and a perpetual injunction against defendant.

A motion for a new trial was made and denied.

Defendant appeals from the final judgment only, and not from the order overruling the motion for new trial.

There is no bill of exceptions or statement on appeal, and we can only look to the judgment roll in determining the propriety of the action of the court below.

The perpetual injunction was warranted by the complaint, and in the absence of any statement, we must presume the evidence was sufficient to justify its issuance.

The awarding of costs to the plaintiff was within the discretion of the court upon decreeing a perpetual injunction.

This leaves nothing to be considered but the validity

of the judgment for one cent damages, rendered upon a special finding of a jury, which is attacked for want of preciseness.

The answer does not deny cutting timber upon the premises, which are found by the jury to belong to the plaintiff, and if it did, we must presume, in the absence of a statement, that there was ample testimony to support the findings.

The finding to which exception is taken is in answer to the following questions:—

“Has the defendant cut upon and taken from the premises described in the complaint, without permission of the owners, any wood since 1870, and prior to the commencement of this suit? If so, what damage was done to plaintiff?”

The answer is as follows:—

“Yes. Damages nominal.”

Under the pleadings, admitting the cutting of the wood by defendant, it must follow that when the ownership of the premises was established in plaintiff, he was entitled as a conclusion of law to nominal damages.

Every trespass upon real property imports an injury, for which the law gives nominal damages. (*Atwood v. Fricot*, 17 Cal. 38.)

By nominal damages is meant some trifling sum, as a penny, one cent, six cents, etc. (Bouv. Law. Dict., tit. Nominal Damages.)

The proposition presented, then, is this: Under the pleadings and facts as found, plaintiff was entitled to nominal damages; and had the jury found otherwise upon this last question, it would have been the duty of the court, in view of the other facts found, to set the finding aside.

We are asked to set the verdict and judgment aside because the term “damages nominal” is not definite and certain.

The answer is, judgments are reversed by this court,

not for error alone, but for such errors as work an injury to the appellants.

Defendant was not injured by a judgment in other respects proper, and which awarded one cent damages against him in a case where plaintiff was entitled to nominal damages.

Again, the law disregards trifles (Civ. Code, sec. 3533), and as only *one cent* is involved in the determination of the question at issue, the doctrine of *De minimis non curat lex* should be invoked, and the judgment of the court below should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 2018C. In Bank.—August 28, 1886.]

THE PEOPLE, RESPONDENTS, *v.* AUGUST DANIELS,
APPELLANT.

CRIMINAL LAW — MURDER — EVIDENCE OF IMMORAL CHARACTER OF DEFENDANT — IMMATERIAL ERROR. — In a prosecution for murder, the admission of evidence tending to show that the defendant was a person of immoral character is without prejudice, if the defendant when a witness in his own behalf testifies substantially to the same effect.

ID. — JUSTIFIABLE HOMICIDE — INSTRUCTION. — In such a case, an instruction that in order to justify the homicide, the defendant, if he was the assailant in the combat during which the killing occurred, or if he was engaged in mortal combat, must in good faith have endeavored to retire from the struggle before the homicide was committed, is substantially in the language of section 197, subdivision 3, of the Penal Code, and therefore not erroneous.

ID. — INSTRUCTIONS. — The refusal to give certain instructions stated in the opinion, *held*, not erroneous.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion.

Joseph Coffey, for Appellant.

Attorney-General Marshall, for Respondent.

FOOTE, C.—The defendant was tried for the murder of a woman named Sarah Indig, and convicted of the crime of manslaughter; from a judgment in the premises, and an order denying him a new trial, he has appealed.

The objection made by him to the introduction of evidence on the part of the people which showed him to have at one time lived with the woman whom he was alleged to have slain in a house of ill-fame was well taken, as tending to prejudice the jury against him as an immoral character, and its admission would have been good ground for a new trial but for the fact that the defendant, as a voluntary witness in his own behalf, testified substantially to the same effect, and hence cannot complain that the jury were informed that he had so lived; for it is not to be supposed that they would have been prejudiced in a greater degree by the statement of that same fact made by the witness on the part of the people than by that of the defendant voluntarily given.

The evidence in the cause was conflicting, the jury have rendered a verdict thereon, and it should not be disturbed merely because of such conflict.

There was evidence introduced to the effect that the defendant, before leaving Los Angeles to come to San Francisco, had made threats against the life of both Somerset and the deceased woman, and it is assigned for error that the court refused to give certain instructions asked for by the defendant upon the subject of such threats.

As the instructions refused had application only to a state of facts which would have been material had the

defendant killed Somerset and been on trial therefor,— which he was not,— we are of opinion that the charge of the court upon the matter of threats covered all that the defendant asked for which was pertinent to the case before the jury.

It is further objected that the court charged the jury, that in order to acquit the defendant they must believe from the evidence—that is, if he was the assailant in the combat in the progress of which the woman lost her life, or if he was engaged in “mortal combat” with the witness Somerset—that the defendant must “in good faith have endeavored to retire from the struggle before the homicide was committed.”

Inasmuch as that part of the charge was a substantial repetition of the language of section 197, subdivision 3, of the Penal Code, as applicable to the case in hand, we perceive no error on the part of the court in giving it.

The charge, taken as a whole, and giving to it a natural and unstrained interpretation, covered all the material instructions asked for by the defendant, and was eminently fair and easily understood by the jury.

The judgment and order should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 20141. In Bank.—August 28, 1886.]

THE PEOPLE, APPELLANT, *v.* W. H. OTTO, RESPONDENT.

CRIMINAL LAW — REFUSAL TO PAY OVER PUBLIC MONEY — INDICTMENT.—The indictment charged in effect that the defendant was the tax collector of Del Norte County from the first Monday in January, 1883, at 12 o'clock, m., to the like day and time on the fifth day of January, 1885; that as tax collector he had on the fifth

day of January, 1885, received and collected certain public money, and on that day, and for five days thereafter, and ever since then, had wholly and willfully refused and omitted to pay it over to the county treasurer. *Held*, that the indictment charged but one offense, and was sufficient under section 424 of the Penal Code.

APPEAL from a judgment of the Superior Court of Del Norte County.

The facts are stated in the opinion.

Attorney-General Marshall, for Appellant.

R. G. Knox, for Respondent.

FOOTE, C.—The defendant was indicted under section 424 of the Penal Code, which reads as follows:—

“Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys, who either,—

“10. Willfully omits or refuses to pay over to any officer or person authorized by law to receive the same any money received by him under any duty imposed by law so to pay over the same is punishable by imprisonment in the state prison for not less than one nor more than ten years, and is disqualified from holding any office in this state.”

The indictment was demurred to, the demurrer sustained, and from the judgment made in the premises the people have appealed.

The grounds alleged in the demurrer why it should be sustained were: 1. That the indictment did not substantially comply with the requirements of sections 950, 951, and 952 of the Penal Code; 2. That more than one offense is charged in the indictment; 3. That the facts do not constitute a public offense.

The indictment set out that the defendant, “during all the times between the first Monday of January,

A. D. 1883, at 12 o'clock, m., and the first Monday, viz., the fifth day, of January, A. D. 1885, at 12 o'clock, m., was the duly elected and qualified sheriff and *ex officio* tax collector of the county of Del Norte and state of California"; that as such it was his duty to receive, safely keep, disburse, transfer, etc., the state and county taxes for the fiscal year ending June 30, 1885; that as such tax collector, on the fifth day of January, 1885, he "had" received and collected a certain amount of money, state and county taxes, the sums belonging to the state and county being stated in the aggregate first, then separately.

That on the first Monday, viz., the fifth day, of January, 1885, and for five days thereafter, at the county and state aforesaid, "the said W. H. Otto, as said tax collector, wholly and willfully omitted and refused to pay over to the county treasurer of said county of Del Norte, the officer authorized by law to receive the same," the sum of money, etc.; and that on the fifth day of January, 1885, etc., "he wholly and willfully omitted and refused, and still does omit and refuse, to pay over" said money, etc.

As in the first part of the indictment it was distinctly charged that defendant was the tax collector of Del Norte County from the first Monday in January, 1883, at 12 o'clock, m., to the like day and time on the fifth day of January, 1885, the charge that "as said tax collector" he "had," on the fifth day of January, 1885, collected the public money, and upon that day, and for five days thereafter, and ever since then, refused and omitted to pay it over, was but charging the defendant with a single offense.

For the word "had," being in the pluperfect tense, denotes that the collection of the money was prior to the fifth day of January, 1885, and taken in connection with the other language preceding it, the statement of fact was that said collection was made during the term

of office of the defendant as tax collector. And the statement that he refused and omitted to pay the money over on the fifth day of January, 1885, and for five days thereafter, and that he wholly omitted and refused, and still refuses, to pay it over, is a charge of but one offense; for he is thereby no more accused of the commission of an offense for each of the five days after the fifth of January, 1885, than for every day since then that he had omitted and refused to pay over. Taking them together, the words last considered convey the meaning that the defendant neither paid the money over on the 5th of January, 1885, when he was tax collector, nor for five days thereafter, nor at any time.

And as a refusal to do a thing includes an omission to do so, there is no charge of two offenses in saying that the defendant "omitted and refused," etc., the greater including the less. The refusal and omission to pay over the sum of money collected was the charge, and the fact that it stated that part of it was state and part county money is not a charging of two offenses.

We are of opinion that the indictment does substantially comply with sections 950, 951, and 952 of the Penal Code, and that the facts set out therein were sufficient to charge a public offense under section 424, subdivision 10, of the code *supra*.

The judgment should be reversed and the cause remanded.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded, with direction to the court below to overrule the demurrer.

Rehearing denied.

[No. 11311. Department Two.—August 30, 1886.]

GEORGE J. MATTHEWS, PETITIONER, *v.* SUPERIOR COURT OF MARIN COUNTY ET AL., RESPONDENTS.

JUSTICE'S COURT — NOTICE OF APPEAL — WAIVER OF OBJECTION — VOLUNTARY APPEARANCE OF RESPONDENT. — On an appeal from a Justice's Court, the voluntary appearance of the respondent and his participation without objection in the trial in the Superior Court, and in the subsequent preparation of a statement for a new trial, is a waiver of any insufficiency in the notice of appeal or in the proof of service thereof.

APPLICATION for a writ of review. The facts are stated in the opinion of the court.

James F. Smith, for Petitioner.

Hepburn Wilkins, for Respondents.

MCKEE, J.—In the case of *Coughran v. Matthews*, on appeal to the Superior Court of Marin County, a writ of *certiorari* was issued on the 20th of October, 1885, to determine whether the Superior Court had pursued its jurisdiction in refusing to settle a statement presented in the case upon a motion for a new trial, and in ordering the dismissal of the motion.

Pending that proceeding in error, Matthews, the petitioner in error, on the 31st of October, 1885, applied for another writ of *certiorari* to determine whether the Superior Court had acquired jurisdiction at all to proceed in the case.

Upon the hearing had upon the first writ, the order of dismissal was reversed, upon the ground that the lower court exceeded its jurisdiction in making the order without first settling the statement upon which the motion for a new trial was to be made.

After the announcement of that decision, a return was made in the proceeding in error instituted by the present writ. The return shows that there had been an appeal taken in the case, "on questions of both law and fact,"

by a notice of appeal addressed to the justice of the peace and "James F. Smith," attorney for respondent. This notice was given under section 974 of the Code of Civil Procedure, which provides *how* an appeal shall be taken to a Superior Court. The provision is: "The appeal is taken by filing a notice of appeal with the justice, and serving a copy on the adverse party." Service on the attorney of record of the adverse party is sufficient. (Code Civ. Proc., sec. 1015.)

But the return shows that the proof of service of the notice consisted of an affidavit in form of service upon "Frank J. Smith, attorney of respondent." And the alleged affidavit was not sworn to or subscribed before any officer. "Frank J. Smith" was not the attorney of record of respondent; and as the proposed affidavit of service was not verified, the proof of service of the notice of appeal was inadequate.

The exercise of jurisdiction by an appellate court in a case where there has been no service of notice of appeal is ineffectual and void. (*Coker v. Superior Court*, 58 Cal. 177; *Trobock v. Caro*, 60 Cal. 301.) But the party upon whom the law requires notice to be served may voluntarily appear and submit himself to the jurisdiction of the court. If he appears, his appearance is a waiver or cure of the want of notice.

The return shows that the attorney of record, to whom the notice of appeal was addressed, appeared on the trial of the appeal in the Superior Court, and that, without objecting to any defect in the proof of service, or moving to dismiss for want of service of notice of the appeal, he participated in the proceedings, and in the preparation of the statement on motion for a new trial which was presented to the court for settlement. Such being the case, the party will not be heard to say that the court had no jurisdiction.

Writ dismissed.

SHARPSTEIN, J., and THORNTON, J.. concurred.

[No 20200. In Bank.—August 30, 1886.]

THE PEOPLE, RESPONDENT, *v.* M. D. REED, APPELLANT.

CRIMINAL LAW — OBTAINING PROPERTY UNDER FALSE PRETENSES — DESCRIPTION OF PROPERTY — VARIANCE. — An indictment for obtaining under false pretenses a promissory note alleged to have been executed by the person defrauded is not sustained by evidence showing that the note was jointly executed by him and another.

ID. — PROMISSORY NOTE — PERSONAL PROPERTY. — Under section 7 of the Penal Code, a promissory note is personal property, and may be the subject of the offense of obtaining property under false pretenses.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are stated in the opinion.

Henry Edgerton, and R. M. Swain, for Appellant.

Attorney-General Marshall, for Respondent.

SEARLS, C. — The defendant was indicted in the county of Sacramento, upon a charge of obtaining property by false pretenses, under section 532 of the Penal Code, and was tried and convicted.

This appeal is from the judgment of conviction, and from an order denying a motion on the part of defendant for a new trial.

The indictment charges that the defendant, at the county of Sacramento, in September, 1885, falsely and fraudulently, and with the intent to defraud one Samuel Purrington of his property, represented to said Purrington that he, the said defendant, was then and there the owner and patentee of a certain patented mechanical invention known and called a mechanical motor; that one Frances Purrington, the mother of said Samuel Purrington, who was in San Francisco, had authorized and directed defendant to tell her son Samuel that she, the mother, had within a few days theretofore purchased

from defendant for her said son Samuel the patent right of and for said invention for the county of Sacramento, and that she desired the said Samuel to agree to said purchase, and to pay defendant therefor one thousand dollars, by executing and delivering to defendant his promissory note therefor, payable to defendant, and to do all things necessary to said purchase; and Samuel Purrington, believing said statements, and being deceived thereby, was induced to deliver to, and did then and there execute and deliver to, said defendant "his, said Samuel Purrington's, promissory note for the sum of one thousand dollars, payable to said defendant, said note being then and there of the personal property of said Samuel Purrington, and of the value of one thousand dollars," and thereupon defendant pretended to consummate the purchase by executing and delivering to Purrington a bill of sale of the patent right for the county of Sacramento.

The indictment then proceeds to aver the falsity of defendant's representations, etc., allegations not important to any question raised.

At the trial, the testimony showed without conflict or contradiction that the bill of sale of the patent right was executed and delivered to Samuel Purrington and Lincoln Purrington, and that the promissory note was dated March 30, 1885, was for one thousand dollars, payable in six months from date, and was the joint note of Samuel Purrington and Lincoln Purrington, both of whom executed it; and that no other note for one thousand dollars was ever made to defendant by them or either of them.

Upon this state of the proofs, the defendant requested the court to instruct the jury as follows:—

"2. In a criminal action, the proofs must correspond with the material averments of the indictment; and in case of a substantial variance between the proofs adduced and such material averments, the defendant is entitled to an acquittal.

"The indictment in this action charges the defendant with obtaining by certain false and fraudulent pretenses and representations the promissory note of *Samuel Purrington* for the sum of one thousand dollars (\$1,000), and the property of said Samuel Purrington. If you find from the evidence that the defendant obtained the joint note of Samuel Purrington and Lincoln Purrington, and did not obtain the individual note of Samuel Purrington, then there is a substantial variance between a material averment in the indictment and the proofs adduced in this action, and you should render a verdict of acquittal."

The instruction was refused, and such refusal is assigned as error.

Section 532 of the Penal Code, under which the indictment was found, provides that "every person who knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property, and thereby fraudulently gets into possession of money or property, is punishable," etc.

The indictment or information must be direct and certain as it regards,—1. The party charged; 2. The offense charged; 3. The particular circumstances of the offense charged when they are necessary to constitute a complete offense.

All these things are set out in the indictment.

Stripped of all verbiage and legal phraseology, it in effect says that, with intent to defraud Samuel Purrington, the defendant informed him that his mother desired him to purchase from defendant the patent right for a certain pump for one thousand dollars, and to give defendant his note therefor.

The whole story was false, but Samuel Purrington believed it to be true, purchased the patent, and gave his note.

A plea of *not guilty* was interposed to this indictment, the effect of which was to deny these material facts.

The evidence was, that defendant represented that their mother wished the brothers, Samuel and Lincoln Purrington, to purchase the patent; that they believed the statement, and did purchase; that the right was assigned to them; and that they jointly made and delivered to defendant their note for the one thousand dollars.

In a prosecution under section 532, the indictment or information should set out with reasonable certainty the pretenses and fraudulent representations by which the party injured was defrauded of his property, and such specific description of the property obtained as will identify it, and give to the defendant notice of what he is required to meet. And between the allegations thus made and the proofs there should be such a correspondence that when the latter are adduced it can be said that the former are substantially established.

In the present case, there was a wide departure from the necessary correspondence between the *allegata* and *probata*. The proofs established another offense, separate and distinct from that charged.

The property obtained by the fraudulent practices of defendant was different from that described in the indictment. This difference was so significant that in a civil action it would have been fatal to a recovery. This discrepancy is not remedied by section 956 of the Penal Code. That section provides that where a public offense "involves the commission of or attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material."

Samuel Purrington and Lincoln Purrington were the parties injured. Under this last section, the mistake of charging that Samuel Purrington only was injured was of no consequence, and if the mistake stopped there, it would avail the defendant nothing. But the offense

actually committed by the defendant was not described "with sufficient certainty *in other respects* to identify the act."

A conviction of the offense *charged* would not be a bar to another indictment for the offense as *proven*.

It is further contended by defendant that the promissory note as proven was not such property as would support the indictment.

At common law, the only description of property which could be the subject of larceny was personal *goods*, that is, mere movables having an intrinsic value. The crime could not be committed of things which savor of the realty, or of written instruments of any description. (4 Bla. Com. 229, 233, 234; 2 Russell on Crimes, pp. 62-70.)

The paper only on which the instrument was written, and not the instrument, was the subject of larceny. This phase of the common law is modified by our Penal Code, section 7 of which provides that the term "personal property" includes "money, goods, chattels, things in action, and evidences of debt."

The promissory note of Purrington was evidence of a debt, and as such was such property as might be the subject of the offense defined by section 532 of the Penal Code.

We are of opinion that the instruction asked by defendant should have been given, and that the refusal was error, for which the judgment and order appealed from should be reversed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded for a new trial.

[No. 8194. In Bank.—August 30, 1886.]

ALAMEDA MACADAMIZING COMPANY, RESPONDENT, *v.* THOMAS H. WILLIAMS, APPELLANT.

STREET ASSESSMENT — CITY OF OAKLAND — MACADAMIZING PORTIONS OF STREET. — Under the statutes of 1864 and 1870, authorizing the city council of the city of Oakland to order the whole or any portion of the streets of the municipality macadamized, the city council has power to let the work of macadamizing separate portions of a street in one contract.

ID. — PROTEST AGAINST PROPOSED WORK — EVIDENCE — FINDINGS — JUDGMENT — PRESUMPTION. — The action was brought to foreclose an assessment for the macadamizing of a street in the city of Oakland. An issue was raised by the pleadings as to whether a majority of the property owners on the line of the street protested against the proposed work. On the trial, the court excluded the written protest offered in evidence by the defendant, but the plaintiff admitted the names of the protestants, and the number of front feet owned by each on the line of the work. Findings were waived, and judgment rendered in favor of the plaintiff. *Held*, that it would be presumed that a majority of the property owners on the line of the work did not protest.

ID. — Held, further, that the exclusion of the written protest was without prejudice to the defendant, as the admission of the plaintiff afforded him the benefit of the testimony which the protest would have furnished.

ID. — DESCRIPTION OF LAND — SIDE LINE OF STREET AS BOUNDARY. — In such an action, where the complaint describes the land assessed as bounded by the side line of the adjoining street, the presumption that the land extends to the center of the street is rebutted.

ID. — RECORD OF STREET ASSESSMENT — EVIDENCE. — Under section 18 of the act of April 4, 1864, the records of a street assessment kept by the marshal of the city of Oakland, and signed by him, have the same force and effect as other public records, and copies therefrom duly certified are admissible in evidence with the same effect as the originals.

ID. — DEMAND OF PAYMENT — ASSESSMENT TO UNKNOWN OWNERS. — Under that act, where the land is assessed to unknown owners, the demand for the payment of the assessment must be publicly made on the premises; a demand made to the owner personally, or on the street in front of the premises, is insufficient.

APPEAL — ERROR IN ADMISSION OF EVIDENCE — EXCEPTION — SPECIFICATION OF ERROR. — Alleged error in the admission of evidence will not be reviewed on appeal, unless the record shows that the evidence was objected to, and an exception reserved at the trial, notwithstanding the statement on motion for a new trial specifies the admission of the evidence as one of the errors on which the party moving would rely.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order refusing a new trial.

The facts are stated in the opinion.

Thomas H. Williams, in pro. per., for Appellant.

J. C. Martin, for Respondent.

SEARLS, C. — This action was brought to foreclose a lien on block 52, East Fourteenth Street, Oakland, based upon a street assessment made by the municipal authorities of the city of Oakland.

Plaintiff had judgment, from which, and from an order denying a new trial, defendant Williams appeals.

The first point made by appellant is, that the council exceeded its jurisdiction in attempting to let the work of macadamizing several separate and distinct portions of Fourteenth Street in one contract.

The jurisdiction of the municipal corporation to improve the street is contained in the statutes of 1863-64, p. 333, and 1869-70, p. 443.

Section 2 of the latter act is in these words: "The city council are hereby authorized and empowered to order the whole or any portion of the streets, lanes, alleys, . . . macadamized," etc., including the power to grade, construct culverts, curbing, cross-walks, etc.

The resolution of intention to do the work as adopted by the city council September, 17, 1877, described the portion of East Fourteenth Street to be macadamized as follows: "From the easterly line of First Avenue to the westerly line of Fifteenth Avenue," except certain portions which are specified, "all of which has already been macadamized to the official grade."

The two acts above referred to confer upon the municipal authorities of the city of Oakland ample authority to open and improve the public streets of that city in all the various modes by which those objects are usually attained, and they might improve "*the whole or any portion of the streets.*"

The improvements to be made in this instance were

confined to a single street, and included the whole surface thereof between certain terminal points, except certain portions which had already been improved and macadamized, and which portions were specifically described. There is no question but the city council clearly designated the portions of the street to be improved and the character of the improvements to be made.

Under such circumstances, we are of opinion the authority of the board was not exceeded by ordering the portions of the same street not yet improved to be macadamized so as to render it uniform with the portions already improved in that respect.

2. The court did not err in excluding the written protest offered in evidence.

The *proposed* work was the macadamizing *certain portions* of East Fourteenth Street, designating them; the construction of certain culverts and cross-walks, describing them and their location, etc.

The protest was "against the macadamizing of said East Fourteenth Street between the points named" as terminals, and did not relate to the cross-walks and culverts to be constructed, was not restricted to the portions to be macadamized, and professed to be made, not by the owners of property upon the portions of the street to be improved, but by property owners on the line of East Fourteenth Street between First and Fifteenth avenues; *non constat* but that the protestants may have all been the owners of property upon the portions of the street already improved and excepted from the work to be done.

We may, however, waive these objection to the protest as technical, for it appears from the record that the issue was made by the pleadings as to whether a majority of the property owners on the line of the street did in fact protest.

At the trial, the names of protestants, and the number of front feet owned by each on the line of the work, were

admitted, and we must presume in the absence of written findings that the finding on this issue was in favor of the plaintiff, who had judgment; and as the admission of the plaintiff afforded defendant the benefit of the testimony which the protest would have furnished, he cannot complain.

3. Plaintiff introduced in evidence a book labeled "Book F, Street Assessment, Oakland," which defendant admitted was the proper street-assessment book of the city of Oakland, in which the assessment mentioned in the complaint should have been recorded.

Plaintiff's counsel then read therefrom the contract between the city marshal, as street superintendent, and the plaintiff herein, for the performance of the street improvements upon which the action is based; and secondly, the record of the assessment, dated "Oakland, June 4, 1878," signed by "J. R. Cutting, Marshal City of Oakland," the diagram signed and dated in like manner, and the warrant attached thereto, authorizing and empowering the plaintiff to demand and receive the several assessments upon the assessment and diagram thereto attached, which warrant was of like date and signed by the marshal as in case of the assessment and diagram, and duly countersigned by the mayor.

The record is verified as follows:—

"Recorded June 4, 1878.

"J. R. CUTTING,
"City Marshal of the city of Oakland."

Then follows the contractor's return, showing a demand, and recorded and certified, as in case of the other record, on the 6th of July, 1878.

We do not find in the record of this cause any objection on the part of defendant to the introduction of this testimony.

The statement of the defendant in his specification of errors, upon which he would rely on his motion for a new trial (Transcript, folio 205), to the effect that he

objected to the testimony, and excepted to the decision admitting it in evidence, cannot be received as a properly authenticated exception.

This is but his specification of an alleged error, and which, upon turning to the statement, proves to be without foundation.

We do not understand that the judge who settles and certifies to the correctness of a statement on motion for a new trial thereby gives validity to the statement of fact in the specifications of error. The specification of errors is essential to a statement, but its office under section 659 of the Code of Civil Procedure is to call attention to the precise ground relied upon, and not to fortify the alleged error by a statement of facts in its support.

The specifications may be amended after the time has expired for preparing and settling the statement on motion for a new trial. (*Low v. McCallan*, 64 Cal. 2.)

But waiving this question entirely, and we fail to find any error in the action of the court admitting the record of the assessment, diagram, warrant, and return.

Section 18 of the act of April 4, 1864 (Stat. 1863-64), provides that "the records kept by the marshal of said city [Oakland] in conformity with the provisions of this act, and signed by him, shall have the same force and effect as other public records, and copies therefrom duly certified may be used in evidence with the same effect as the originals."

As a public record, the evidence offered, being fair on its face and signed by the marshal, was proper to be admitted in evidence.

So, too, the certificate of record signed by the marshal was sufficient to authenticate it as a record.

The defendant on his part introduced evidence tending to show that on the sixth day of July, 1878, the name of J. R. Cutting was not at the end or bottom of the assessment; that the recollection of the witness (D. H. Whittemore) was that it was not at the end of the dia-

gram, but of that fact the witness was not certain,—that his impression was the warrant was signed and counter-signed.

The finding of the court below being in favor of plaintiff, and the court having the record before it, with all the evidence on the subject, we do not feel at liberty to disturb the result for this cause.

4. The several lots of land of the defendant were assessed to unknown owners, and the plaintiff herein, after receiving the assessment, diagram, and warrant, caused payment to be demanded of defendant as follows: 1. By a demand upon the defendant personally; 2. By a demand made upon each and every of the assessed lots by standing on the sidewalk in front of and close to the fence bounding such lots, but not actually upon them (unless such lots extended to the middle of the street), and there making a demand in an audible voice.

The statute of April 4, 1864 (Stats. 1863-64, p. 338), provides that the contractor or his agents or assigns shall call upon the persons assessed, if they can be found, and demand payment; but whenever they cannot be found, "or whenever the name of the owner of the property is stated as 'unknown' in the assessment, then the said contractor, or his agent or assigns, shall publicly demand payment on the premises assessed."

The street seems, from the record, to have been filled in front of the lots of the defendant, so that they, or a part of them at least, were in a hollow, and so far as appears, such lots were unoccupied.

The questions presented are:—

1. Did the lots in question extend to the middle of the street, so that the demand was in fact made by a person standing upon them? and if not, then,—

2. Was the demand so made, contiguous to the premises and capable of being heard thereon, but by a person not actually standing upon the land, a sufficient compliance with the requirements of the statute?

Section 881 of the Civil Code is as follows:—

1. "An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown"; and by section 1112 of the same code, it is provided that "a transfer of land bounded by a highway passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant."

The conveyance under which defendant holds the property is not before us. The contention of appellant is, that the assessment and diagram show that the line of the lots runs along the margin of the street, *and not into it.*

The assessment describes the property as "fronting upon East Fourteenth Street in said city," etc., and the diagram attached thereto, and to which reference is made, simply shows the lots on each side of the street, and the several cross-streets.

Were these the only sources from which to arrive at a conclusion, we should doubt their sufficiency to overcome the presumption of the code; but turning to the complaint, we find a specific description of defendant's several parcels of land, from which it appears that the margin or line of the street is the boundary of the land.

In *Severy v. C. P. R. R. Co.*, 51 Cal. 194, it was held that where a deed described the conveyed premises as running "thence along the easterly line of Sacramento Street 150 feet," and no other language was employed to modify or affect this description, the eastern line, and not the middle of Sacramento Street, was the boundary. (*Maynard v. Weeks*, 41 Vt. 617; *Tyler v. Hammond*, 11 Pick. 193; *Van O'Linda v. Lothrop*, 21 Pick. 295.)

Land described in a deed as bounded by a street will be considered as bounded by the center of the street, unless it clearly appears that it was intended to make the side line of the street as a boundary instead of the center. (*Moody v. Palmer*, 50 Cal. 31.)

In the present case, it does clearly appear from the complaint that the side line of the street is the boundary.

To illustrate: in assessment No. 272 the land assessed is described as follows: "Commencing at the point of intersection of the westerly line of Second Avenue with the northerly line of East Fourteenth Street; running thence westerly along said line of East Fourteenth Street 145 feet; thence at right angles 140 feet; thence at right angles easterly 145 feet to the said line of Second Avenue; thence southerly along said line of Second Avenue 140 feet, to the point of commencement."

With such a description, we hold the presumption that the lot runs to the center of East Fourteenth Street and Second Avenue is rebutted.

There are four parcels of land described, all in like terms, and hence the conclusion is the same as to all the parcels.

2. As to the sufficiency of the demand made by a person not actually upon the premises. It is proper to say before discussing this last question that the demand made upon defendant personally was without authority of law.

The statute provides but one mode of making a demand in cases where, as in the present, the property is assessed to "unknown owners," and that is by a demand upon the premises. It matters not that other methods may be as efficacious as the one provided. The lawmakers have prescribed a method, and the courts are not at liberty to adopt a substitute therefor.

This preliminary question disposed of, it only remains to determine the legality of the demand upon the premises made as hereinbefore stated.

The language of the statute is as follows: "Whenever the name of the owner of the lot is stated as 'unknown' in the assessment, then the said contractor, or his agent or assigns, shall publicly demand payment on the premises assessed."

The contention of the respondent is, that if the person making the demand is in such close proximity to the premises that his voice can be heard thereon, all the objects of a demand are attained, and that a physical, corporeal contact with the premises by the person making the demand can add nothing to its efficiency; and such seems to have been the view of the court below.

So far as the present case is concerned, at least, this view seems plausible. We must, however, give to this provision of the statute an interpretation alike applicable to all cases arising under it. If the demand may be legally made by one not actually upon the premises, then how far from such premises may he remain, and the demand still be held good? If it be answered that it may be made at any distance provided the voice can be distinctly heard upon the premises, the response must be that the effect of this rule will tend to substitute the opinion of the person making the demand as to whether he could be heard for an essential fact in the case, and will tend to open a door for fraud. Premises of this character in a city will usually have an occupant, or some person in charge, to whom the presence of a person upon them in the attitude of an apparent trespasser will in itself many times attract attention and cause the demand to be heard.

Many reasons more or less cogent might be urged why the law-makers required a demand to be made upon the premises to be charged, but it is sufficient to say that the statute so requires, and that in our opinion by the term "on the premises" the law-makers meant "by a person on the premises."

This provision seems to have been taken from the rule of the common law in relation to the demand of rent before entry or ejectment, where, in order to claim a forfeiture, it was held that, in the absence of an agreement to the contrary, a demand must be made "upon the land, and at the most notorious place of it"; and

such demand, it is said, must be made although there be no person present to answer; and as the tenant had the whole day upon which the rent fell due to make payment, the landlord or his agent, to complete the forfeiture, must not "only make the demand at the proper time and place, but must *remain upon the land* and continue the demand actually or constructively until after sunset." (Wood's Landlord and Tenant, sec. 452.)

And it was even held that a personal demand made off the land was not sufficient to work a forfeiture of a lease.

The land was regarded as the debtor, and to create a forfeiture for non-payment of rent, the demand must be made upon it. So in the present case the land is charged with the payment of the assessment, and where the owner is designated as "unknown," the statute is imperative in requiring the demand to be made *publicly on the premises*; and a demand made near to, in the neighborhood of, or within hearing of the premises does not satisfy the requirements of the statute.

It follows that the demand as made was insufficient, and the judgment of the court below and the order denying a new trial should be reversed and a new trial had.

BELCHER, C. C., and FOOTE, C., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the judgment and order are reversed and cause remanded for a new trial.

[No. 11335. Department Two.—August 31, 1886.]

EUGENE R. PLUMMER, APPELLANT, *v.* JOHN A. BROWN, DEFENDANT. MARTHA BROWN, SUBSTITUTED DEFENDANT AND APPELLANT.

PUBLIC LAND — CONTEST AS TO RIGHT TO PURCHASE — CONCLUSIVENESS OF JUDGMENT. — In hearing and determining a contest between rival claimants of the right to purchase public lands of the United States, the officers of the land department act judicially; and their judgments cannot be collaterally assailed in an action at law.

ID. — TITLE ACQUIRED BY FRAUD — TRUST — ACTION TO COMPEL CONVEYANCE OF LEGAL TITLE. — If the successful claimant has acquired, pursuant to the judgment, the legal title affected with any fraud or trust in relation to it, he will be regarded in equity as a trustee of the true owner, who may by a proper proceeding compel a conveyance to himself of the legal title.

ID. — PLEADING — EVIDENCE. — In an action by the unsuccessful claimant to compel a conveyance of the legal title, the plaintiff must distinctly allege and clearly prove that he occupies such a *status* as gives him the right to control the legal title.

ID. — The action was brought by an unsuccessful claimant of the right to purchase certain public land of the United States under the pre-emption and homestead laws, against the successful claimant, to compel the latter to convey the legal title to the plaintiff. The complaint showed that in the contest as to the right to purchase, the land department had decided that the defendant settled upon and occupied the land before the plaintiff entered upon it, and had not abandoned his occupation, and that the plaintiff invaded the occupation of the defendant, and was not a qualified pre-emptor. *Held*, that the plaintiff was not in a position to control the legal title issued to the defendant.

ID. — INSUFFICIENT ALLEGATIONS OF FRAUD. — In order to avoid the conclusiveness of the judgment of the land department, the complaint alleged in general terms that the judgment was based upon certain false, perjured, incompetent, and irrelevant evidence introduced by the defendant, but did not state what the evidence was. *Held*, that the complaint was insufficient.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

Edwin Baxter, for Appellant.

Bicknell & White, and *C. Cabot*, for Respondent.

MCKEE, J.—The only question for consideration on this appeal is, whether the court below erred in sustaining a demurrer to the complaint upon the ground that it did not contain facts sufficient to constitute a cause of action.

It appears from the allegations contained in the complaint that there was a contest between the plaintiff and John A. Brown before the register and receiver of the United States land-office, about the right to purchase from the United States, under the pre-emption and homestead laws, a tract of public land in Los Angeles County, described as the southeast quarter of section 23 in township 1 south, range 14 west, San Bernardino meridian,—the official plat and map of which had been filed in the year 1875 in the proper United States land-office. The commissioner affirmed the decision. Plummer then appealed to the Secretary of the Interior, and that officer also affirmed the decision; after which there was issued a patent pursuant to the judgment to Brown, confirmatory of his right to the land under the provisions of the homestead law.

Notwithstanding the judgment, the plaintiff insists that the land ought to have been awarded to him, because, as it is alleged, he established his right to purchase it under the laws of the United States by satisfactory proof; and the register and receiver would have awarded it to him if he had not been imposed upon by "false and perjured testimony," which misled and deceived him, and biased him to decide in Brown's favor, upon facts which were found upon "the false and perjured testimony" and "incompetent and irrelevant evidence" given by Brown; which, it is also alleged, the other officers of the land department were likewise fraudulently induced to affirm the judgment in Brown's favor. Upon these grounds, the plaintiff asks for a decree declaring that Brown holds the legal title to the land in trust for the plaintiff, and that he be compelled to convey it to the plaintiff.

On the hearing and determination of a contest between two rival claimants of the right to purchase a tract of public land under the land laws of the United States, the register and receiver of the land department acts judicially; and his judgment, especially after it has been affirmed on appeal, is final and conclusive upon the contestants; so also is the patent issued upon the judgment; neither can be collaterally assailed. (*Garland v. Wynn*, 20 How. 6; *Lytle v. Arkansas*, 9 How. 328; *Cunningham v. Ashley*, 14 How. 382; *Barnard v. Ashley*, 18 How. 43.)

But while the judgment is conclusive at law, there is no doubt of the equitable doctrine that if the successful contestant has acquired, pursuant to the judgment, the legal title affected with any fraud or trust in relation to it, he will be regarded in equity as a trustee of the true owner, and the owner may by a proper proceeding in equity compel a conveyance to himself of the legal title. (*Stark v. Starrs*, 6 Wall. 402; *Johnson v. Towsley*, 13 Wall. 72.)

To entitle the alleged owner, however, to such equitable relief, he must show that he occupies such a *status* as entitles him to control the legal title; that the officers who awarded the land to another, to whom the title was issued pursuant to the judgment, were imposed upon and deceived by the fraudulent practices of him in whose favor the judgment was given; and that they were thereby induced to give judgment in his favor. These things must be distinctly alleged and clearly proven. (*Payne v. Elliot*, 54 Cal. 339; *Kentfield v. Hayes*, 57 Cal. 409; *Chapman v. Quinn*, 56 Cal. 266; *Burrell v. Haw*, 48 Cal. 225; *Powers v. Leith*, 53 Cal. 711; *Hosmer v. Duggan*, 56 Cal. 257; *Aurrecochea v. Sinclair*, 60 Cal. 532.)

The complaint under consideration contains no sufficient allegations of such issuable facts; and it does show affirmatively that the plaintiff was not entitled to the relief which he demands. For it appears that in the con-

test as to the right to purchase the land which was the subject of the controversy, there were three issues presented, namely: 1. Had Brown settled upon and occupied the land before the plaintiff entered upon it? 2. Did Brown abandon his occupation, or did the plaintiff invade it? 3. Was the plaintiff a qualified pre-emptor? — and that those issues were found against the plaintiff and in favor of Brown. It follows, therefore, as the issues were decided against the plaintiff, that he was a trespasser upon Brown's possession, and was not a qualified pre-emptor, so that he had no right of entry upon the land, and he acquired no pre-emption right by his unlawful entry upon it by which he could control the legal title issued to Brown pursuant to the judgment in his favor. (*Atherton v. Fowler*, 96 U. S. 513; *Hosmer v. Wallace*, 97 U. S. 575.)

But it is contended that the judgment is not conclusive against the plaintiff, because it was rendered "upon the false and perjured testimony" and "incompetent and immaterial evidence" of Brown, which the register admitted, "notwithstanding Brown repeatedly refused to submit to cross-examination," and "was prevailed upon by Brown and his attorneys to give it weight and credence, notwithstanding it was shown by record to be false and perjured," and "notwithstanding it was clearly inadmissible under all rules of law and of courts, and clearly incompetent and irrelevant"; and thereby "said officers were misled and deceived, and their judgment biased by said defendant and his attorneys; and in consequence thereof, said land-officers, . . . contrary to the law, and contrary to undisputed facts, thereupon ruled and decided erroneously, falsely, illegally, and inequitably that said defendant, Brown, was entitled to said land, and awarded the same to him."

In these allegations, there is nothing of an issuable character as to what evidence was false or perjured, incompetent, and irrelevant, upon which a court could

judicially determined whether as evidence it was improperly admitted or illegally considered; nor is there in them anything which shows what was the evidence upon which the decision was made, or that it was evidence which did not justify the decision, or showed that the decision was contrary to law. The allegations are of a general nature, and wholly insufficient. A person against whom charges of fraud and perjury are made is entitled to specific averments of the acts of fraud of which he is accused, so that he may admit or deny the acts, and present issues which the court may hear and decide. In *Vance v. Burbank*, 101 U. S. 519, the rule is thus stated: "Where fraud and misrepresentations are relied upon as ground of interference by the court, they should be stated with such fullness and particularity as to show that they must necessarily have affected the action of the officers of the department. Mere general allegation of fraud and misrepresentations will not suffice." (See also *Marquez v. Frisbie*, 101 U. S. 478; *Quimby v. Conlan*, 104 U. S. 426; *United States v. Atherton*, 102 U. S. 872; *Steel v. Smelting Company*, 106 U. S. 453.)

The demurrer to the complaint was properly sustained.
Judgment affirmed.

SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 11244. Department Two.—August 31, 1886.]

JOHN PERRY WILLS, RESPONDENT, *v.* RHEN KONG,
APPELLANT.

NEW TRIAL — STATEMENT — PRESENTATION FOR SETTLEMENT — TIME FOR. — The defendant, having duly served his proposed statement on motion for a new trial, to which the plaintiff had duly served amendments, presented the same to the judge for settlement fourteen days after the service of the amendments. No notice was given to the plaintiff of the presentation. The judge refused to settle the statement because it had not been presented in time, and because no notice of the presentation had been given. The defendant thereupon engrossed the statement, embodying therein all

of the proposed amendments, and presented it to the judge for settlement thirty days after the former presentation. *Held*, that the engrossed statement was a new statement, and that the judge had no authority to settle and allow it, as the time for the service of a statement had passed.

APPEAL from a judgment of the Superior Court of Colusa County, and from an order refusing a new trial.

The facts are stated in the head-note and opinion of the court.

John C. Deuel, for Appellant.

H. M. Albery, for Respondent.

THE COURT. — In this cause, the judge refused on objections of plaintiff's counsel to settle and allow the statement on motion for a new trial presented by defendant.

The objections of the counsel for plaintiff were that the defendant had not complied with the statute in procuring the judge to settle the same.

Prior to the refusal of the judge to settle the statement, amendments had been proposed to it by the plaintiff. After such refusal, defendant engrossed the statement with the proposed amendments, and presented the engrossed statement to the judge for settlement, and the judge, against the objections of plaintiff, settled and allowed the statement.

The judge having once refused to settle the statement, the matter was ended so far as that officer was empowered to settle it. The engrossed statement was then a new statement presented for allowance, and the time for the service of a statement having long passed, the judge was not authorized by the statute to settle and allow it.

The statement must, then, be disregarded.

There is no error in the record, and the judgment and order are affirmed.

[No. 11279. Department Two.—August 31, 1886.]

FREDERICK FREY ET AL., RESPONDENTS, *v.* M. H. LOWDEN ET AL., APPELLANTS.

WATER RIGHTS — APPROPRIATION — EQUITY — INJUNCTION. — A court of equity has power to ascertain and determine, as between several appropriators of the waters of a natural stream, the extent of the respective rights of each in the waters therein flowing, to regulate the use thereof in such a way as to maintain equality of rights in the enjoyment of the common property, and to enjoin a subsequent appropriator from interfering with the rights of the prior appropriators as ascertained and established by the court.

Id. — WATER DITCH — EVIDENCE OF CAPACITY — EXPERTS. — A witness who has had many years' practical experience in mining and measuring and selling water to miners, although not an expert in the science of measuring water, may testify to the carrying capacity of a particular water ditch.

APPEAL from a judgment of the Superior Court of Trinity County.

The facts are stated in the opinion of the court.

W. J. Tinnin, for Appellants.

Chadbourne & Hatch, and *J. W. Philbrook*, for Respondents.

McKEE, J. — This was an action to determine certain rights claimed by the plaintiffs to the use of the waters of a creek in Trinity County, known as the Grass Valley Creek, to enjoin the defendants from infringing those rights, and to recover damages for conversion of a portion of the waters appurtenant to them.

The court finds that both plaintiffs and defendants were owners and entitled to certain rights in the flow of the waters of the creek,—the plaintiffs to rights appurtenant to two ditches, one known as the Ohio Flat ditch, and the other as the Frey and Taylor ditch, and to a saw-mill upon the creek known as Burn's saw-mill, and the defendants to rights in the flow of the same watercourse as appurtenant to two ditches of which

they were owners, one known as the Lowden Ranch ditch, and the other as the Lowden and Singleton ditch.

The right appurtenant to the Ohio Flat ditch was prior in time; that to the Lowden Ranch ditch was next in order. Subsequently, the right appurtenant to Burn's saw-mill was acquired, and that was followed by the acquisition of the right appurtenant to the Lowden and Singleton ditch, after which the plaintiffs acquired the right appurtenant to the Frey and Taylor ditch.

But plaintiffs and defendants derived their rights from appropriation under the statute laws of the state; and under the law, they, in the enjoyment of their rights, became and were tenants in common in the use of the flow of the stream, and entitled to appropriate from it to the extent of their rights in the order of time at which they had been acquired.

The times at which the several ditches had been constructed, and their capacities to carry water, and the purposes for which the water of the stream was appropriated and used by means of the ditches, are fully covered by the findings made and filed by the court under sections 632 and 633 of the Code of Civil Procedure. Upon these findings, the court, by its decree, fixed and established the respective rights of the parties, and regulated between them the use of the flow of the water of the stream according to priority of rights.

There is no doubt of the power of a court of equity to ascertain and determine the extent of the rights of property in water, flowing in a natural watercourse, acquired by persons who hold and are entitled to them, and to regulate between or among them the use in the flow of the water in such a way as to maintain equality of rights in the enjoyment of the common property.

But the principal assignment of error is, that the findings, conclusions of law, and judgment are not supported by the evidence; and it is specially assigned that the find-

ing "that the Ohio Flat ditch was entitled to one thousand inches of water" was made upon evidence given by witnesses for the plaintiffs, who had no knowledge of the science of measuring water, against the evidence of defendants' witnesses, who were experts,— "were educated and experienced in the measurement of water, and who did make the actual measurement on mathematical rules."

The capacity of a ditch is a question of fact which does not require for its proof unusual scientific attainments or peculiar skill; it may be established, like any other fact, by competent testimony; and the record shows that many of the witnesses called by the plaintiffs testified upon the subject from knowledge acquired by them in thirty years' experience in mining and in measuring and selling water to miners. As non-experts, such witnesses were as competent as experts to testify to the fact; and although their statements as to the fact were contradicted by the opinions of experts, that only made a conflict in the evidence, which had to be determined upon the credibility of the witnesses themselves and the weight of their evidence. The finding was therefore made upon substantially conflicting evidence; and a finding or verdict made upon such evidence is not reviewable.

The court did not err in overruling the objections made to the admissibility of the testimony of plaintiffs' witnesses; nor in denying the motions made to strike out their evidence.

Nor was it error to enforce by injunction a cessation of acts by the defendants injurious to the plaintiffs' rights as ascertained and established by the court.

We find no reversible error in the record.

Judgment affirmed.

SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 9411. Department Two.—August 31, 1886.]

RICHARD MAGEE, RESPONDENT, *v.* CATHARINE McMANUS, APPELLANT.

SPECIFIC PERFORMANCE — CONTRACT MUST BE DEFINITE AND CERTAIN — EVIDENCE. — The specific performance of a contract cannot be had unless the thing agreed to be done is definite and certain in its terms and in itself, and the party claiming performance establishes by clear and satisfactory proof the existence of the contract as he alleges it.

Id. — CONTRACT FOR INDEMNITY — AGREEMENT TO EXECUTE NOTE AND MORTGAGE. — The action was brought to procure the specific performance of a parol contract. The complaint alleged that the plaintiff, having become liable as the accommodation surety for the defendant on two promissory notes, bearing a given rate of interest, entered into a contract with her whereby she promised, in consideration of his joining with her in the execution of a new note for six hundred dollars, payable six months after date, at a different rate of interest, to secure him against liability on the three notes by giving him her individual note secured by a mortgage upon her homestead property, the note to be made payable to him at the same time as the six-hundred-dollar note, in a sum equal to the whole amount then due on the three notes, and to bear the same rate of interest, and the mortgage to be made in such an amount as would secure him against any liability by reason of his becoming her surety. The court found the contract as alleged in the complaint, except that it was made in consideration of the plaintiff becoming surety on a note payable one year after date. *Held*, that specific performance of the contract could not be had, — 1. Because the contract as alleged in the complaint and as found by the court differed in the consideration; and 2. Because the contract was indefinite and uncertain both as to the time of payment of the note and mortgage, and as to the amount for which the mortgage was to be given, and the rate of interest on the note.

Id. — WAIVER OF RIGHT TO SPECIFIC PERFORMANCE. — The plaintiff performed his part of the contract, but there was no subsequent ascertainment or agreement as to the amount and terms of the mortgage; nor did he make any demand on the defendant for a performance on her part until after the debt for which he was surety became due, at which time the contract in its original shape could not be performed. *Held*, that the plaintiff had waived his right to a specific performance of the contract.

Id. — SURETY — RIGHTS OF AFTER PAYMENT — INSOLVENCY OF PRINCIPAL — HOMESTEAD — EXCESSIVE VALUE. — The complaint alleged and the court found that the defendant was insolvent, but owned certain premises which she claimed as a homestead. The notes on which the plaintiff was surety were otherwise unsecured. *Held*, that upon the payment of the notes by the plaintiff, his rem-

edy was by an action at law against the defendant to recover the amount that he had paid, and that the judgment therein might be enforced against the homestead premises to the extent that they exceeded in value the amount allowed by the statute.

APPEAL from a judgment of the Superior Court of Marin County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Thomas F. Barry, for Appellant.

Bowers & Crowley, and *E. B. Mahon*, for Respondent.

MCKEE, J.—In this case, the defendant was required by the judgment of the court below "forthwith to execute and deliver to plaintiff a note and mortgage, to wit, her promissory note in the sum of \$1,662.40, payable to plaintiff on demand, and bearing interest at the rate of seven per cent per annum from the fourth day of October, 1882, secured by her mortgage on the lands and premises described in plaintiff's amended complaint, the same being a certain lot of land and premises situate, lying, and being in the township of Nicasio, county of Marin, state of California"; and from the judgment, and an order denying a motion for a new trial, the defendant appealed. The judgment was rendered in an action to compel specific performance of a contract to execute a note and mortgage.

By the allegations of the complaint, it appears that the plaintiff had become liable to the Bank of Sonoma County upon two promissory notes, one for five hundred dollars, and the other for three hundred dollars, which had been executed by him as an accommodation surety for the defendant. Each of the notes bore interest at one and one fourth per cent per month, payable quarterly, or to be compounded. On the 23d of June, 1881, both notes were past due and unpaid. As principal debtor, the defendant had paid the interest upon them as it became due, but failed to pay any part of the principal. She

had not at that time the means to pay any part of it, and she wanted to negotiate with the bank for a fresh loan. To enable her to do so, she applied to the plaintiff to become surety for her upon a new note to the bank, promising him that if he would join her in the execution of a note payable six months after date to the bank in the sum of six hundred dollars, with interest at the rate of one per cent per month, payable every six months, or to compound,—upon which she could get the money from the bank,—she would on demand secure him against liability for her upon the three notes by giving him her individual note secured by mortgage upon her homestead property, the note to be made payable to him “at the same time as the six-hundred-dollar note, in a sum equal to the whole amount then due, and for which he was liable on the first two notes, and also upon the six-hundred-dollars note, with accruing interest,” and “to bear the same rate of interest,” and the mortgage to be made “in such amount as to secure plaintiff against any liability by reason of his becoming her surety as aforesaid.”

The plaintiff consented, and upon the faith of the promise made by the defendant, he joined her in the execution of a note payable to the bank for six hundred dollars, upon which she procured the money from the bank; but she failed and refused to keep her promise, made default in the payment of any part of the principal and interest of the three notes, and when the six-hundred-dollar note became due, the plaintiff was compelled by the bank to pay \$1,664.40, in satisfaction of the three notes which he had signed as the accommodation surety of the defendant. The payment was made on the 4th of October, 1882.

The finding of the court states that at the time and under the circumstances set forth in the complaint, the plaintiff, as the accommodation surety of the defendant, did join the defendant in the execution of a note for six

hundred dollars, which she had discounted by the Bank of Sonoma County; and that in consideration of the execution of the note by the plaintiff, she verbally promised and agreed to secure him against liability already incurred upon the two notes, and to be incurred upon the six-hundred-dollar note, by her individual note payable to himself, as stated in the complaint, and secured by a mortgage to be made "in such amount and terms to secure him against any liability by reason of his becoming her security as aforesaid."

It is also found by the court that the plaintiff performed his part of the contract; that the defendant refused to execute and deliver to the plaintiff her note and mortgage according to her promise; that after the 21st of June, 1881, she made default in the payment of any part of the principal or interest of the three notes; that after the six-hundred-dollar note became due, the plaintiff, on the 4th of October, 1882, had to pay to the bank for the defendant in satisfaction of the three notes the sum of \$1,664.40; and that the defendant is insolvent.

It is a cardinal principle of natural justice that a person shall perform his agreement. Upon that principle, a court of equity, in the exercise of well-regulated and judicial discretion, enforces the actual accomplishment of a thing stipulated for, on the ground of what is lawfully agreed to be done ought to be done. But the thing agreed to be done must be definite and certain in its terms and in itself; and the party who claims performance must make out by clear and satisfactory proof the existence of the contract as he alleges it.

That has not been done in this case. The contract as it is stated in the finding of the court is not the contract as it is alleged in the complaint. Instead of a contract founded upon a consideration to become surety for the defendant upon a promissory note payable "six months after date," as alleged in the complaint, the court finds it was a contract made in consideration of becoming

surety upon a note payable "one year after date." The consideration of a contract is a material part thereof. Two similar contracts founded upon different considerations cannot be regarded as one and the same. However, whether the true contract be that which the court finds or that which the plaintiff alleges, it is indefinite and uncertain,—not only as to the time of the payment of the note and mortgage to be executed, but as to the amount for which the mortgage was to be given, and the rate of interest upon the debt. It appears that these things were to be the subject of future ascertainment and agreement, so that the mortgage when executed would be sufficient security for the plaintiff. As, therefore, the agreement was not final, and it was indefinite and uncertain in its terms and in itself, specific performance of it could not be enforced in equity. (*Morrison v. Rossignol*, 5 Cal. 64; *Los Angeles etc. Ass'n v. Phillips*, 56 Cal. 539; *Potts v. Whitehead*, 20 N. J. Eq. 55.) *Irvine v. Armstrong*, 31 Minn. 216, cited in argument by respondent's counsel, does not conflict with these views. In that case, "the terms of the notes and mortgage were definitely agreed upon."

Besides, the contract as it is alleged in the complaint was not a parol contract for the sale of real property or any interest therein. In its nature, it was a purely mercantile contract, whereby the defendant undertook to indemnify the plaintiff in a particular mode against any loss or damage on account of becoming surety for her. The undertaking was not within the statute of frauds. (Civ. Code, secs. 2772, 2794, subd. 2; *Lerch v. Gallup*, 67 Cal. 595.) And the person to whom the promise was made, after complying with it on his part by becoming surety for the promisor, had the right, at any time within which the promise could be fulfilled according to its terms, to call for performance. But such a right may be waived (*Price v. Dyer*, 17 Ves. 356); and if it be waived by delay to call for performance

until performance becomes impracticable in the mode prescribed by the promise, specific performance will not be decreed. Equity only enforces performance of a contract as it is made by the parties themselves; it has no power to make a contract for them. (*Grey v. Tubbs*, 43 Cal. 359.)

We think the plaintiff waived his right to call for a specific performance of the contract of indemnity in its original shape. The case shows that there was no subsequent ascertainment or agreement as to the amount and terms of the mortgage to be executed as security; there was no demand made for its execution within "six months" or "one year" after the date of the contract. It is alleged in the complaint, "that on the 30th of August, 1882, plaintiff demanded of defendant execution of a note and mortgage in accordance with her agreement." The court finds "that the plaintiff demanded performance prior to the commencement of the action," and the action was commenced in October, 1882. So that in fact there was no demand made for performance until after the plaintiff was brought under liability by the debt falling due, and at that time the verbal contract in its original shape could not be performed.

Yet as a surety brought under liability to pay the debt of his principal, the plaintiff had the right upon the doctrine of exoneration, if the principal was insolvent, to be substituted to any subsisting securities for the payment of the debt, and to be subrogated to the benefit of such securities. In case of the insolvency of the principal, this right attaches, and may be enforced *before* payment, and also *after* payment, whether the principal be solvent or insolvent.

In *McConnell v. Scott*, 15 Ohio, 401, a surety, after a judgment taken against himself and his principal, and *before* payment of the judgment, was held entitled to any credits of the principal, and to have them appropriated

in payment of the judgment. And a like right was enforced in favor of a surety in *York v. Landis*, 65 N. C. 536, after payment of the debt of the principal. (1 Story's Eq. Jur., sec. 322; 2 Story's Eq. Jur., sec. 730.)

The cases of *McCorkle v. Brown*, 9 Smedes & M. 167, and *Pratt v. Carroll*, 8 Cranch, 471, have no application. Both cases involved rights arising out of contracts for the sale of real property by vendors who claimed enforceable vendor's liens upon the lands for the payment of unpaid portions of the purchase-money. In neither was there any question of rights arising out of a contract to indemnify.

It is alleged in the complaint, and the court finds, that the defendant *is* insolvent. But as there were no subsisting liens or securities for the payment of the debt to the creditor, no question of subrogation to securities could arise either *before* or *after* payment of the debt. When the plaintiff paid the debt to the creditor, he acquired all the rights of the creditor for the purpose of obtaining reimbursement. (Civ. Code, sec. 779.) The only right which he acquired was an action at law to recover what he had paid, and his remedy for the enforcement of that right was ample and adequate; for while it is alleged that the defendant *is* insolvent, it is admitted that she is the owner of certain land and premises, which she claimed as her homestead. Although it is not alleged, it may be inferred, that the defendant is an unmarried woman; but it nowhere appears in any way whether she was or is the head of a family, or whether the value of the homestead exceeds or falls short of the statutory limitation,—there is no allegation at all as to value. If it was a one-thousand-dollar homestead upon premises which were worth several thousand dollars, there is nothing to prevent the plaintiff from enforcing by execution any judgment which he may recover. (Civ. Code, secs. 1241, 1245.

Where a party has an adequate remedy at law, he is not entitled to relief in equity.

Judgment and order reversed, and cause remanded for further proceedings.

SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 11543. Department Two.—August 31, 1886.]

MARY KELLY, EXECUTRIX ETC OF WILLIAM WEARMAN, DECEASED, RESPONDENT, *v.* MARGARET MURPHY, APPELLANT.

BILL OF PARTICULARS — FAILURE TO FURNISH — EXCEPTION TO EVIDENCE — DEMAND — APPEAL. — An exception by the defendant to the introduction of evidence in support of the claim of the plaintiff, because of his failure to furnish a bill of particulars, will not be considered on appeal if the record fails to show that any demand for a bill of particulars was made by the defendant.

CONVERSION — INSUFFICIENT DESCRIPTION OF PROPERTY — DEMURRER. — In an action to recover damages for the conversion of certain personal property, an objection to the complaint that it does not describe the property alleged to have been converted with sufficient particularity must be taken by special demurrer.

PARTNERSHIP — NOTICE OF DISSOLUTION — EVIDENCE. — A notice published in a newspaper of the dissolution of a firm, and of the continuance of the business by one of the partners, is admissible in evidence to show who conducted the business after the dissolution, and in whose possession the firm property remained.

ID. — OWNERSHIP OF BUSINESS — EVIDENCE. — As tending to show that a particular business was conducted by a deceased person ostensibly for himself and in his name, and not for or in the name of another, evidence that the goods used in the business were sold to him in his own name and charged to him individually is admissible.

FRAUDULENT SALE — RETENTION OF POSSESSION BY VENDOR — EFFECT OF. — A sale of personal property not accompanied by an immediate delivery and followed by a continued change of possession is void under section 3440 of the Civil Code, not only as against creditors of the vendor, but also as against the executrix of his last will.

PLEADING — ALLEGATION OF COVERTURE — EVIDENCE. — The action was brought to recover damages for the conversion of certain personal property alleged to belong to the estate of one William Wearman. The defendant was sued by the name of Margaret Murphy. In her answer, she alleged "that her true name is Margaret Murphy

Wearman"; that she owned and possessed the property in controversy in her own separate right "and controlled the same as her separate property independent of her husband, the said William Wearman." Held, that these allegations did not aver a coveture of the defendant and Wearman, and that evidence thereof was inadmissible.

MARRIAGE — LIVING TOGETHER AS HUSBAND AND WIFE. — An offer to prove that a man and woman lived together as husband and wife is not an offer to prove their marriage.

APPEAL from a judgment of the Superior Court of Yuba County, and from an order refusing a new trial.

The action was brought to recover damages for the conversion of certain personal property alleged to have been owned by the plaintiff's testator at the time of his death, and described in the complaint as the saloon fixtures and furniture and stock in trade of liquors, cigars, and tobacco contained in a certain saloon in Marysville. Prior to October 2, 1882, the property in controversy belonged to a firm composed of William Wearman, the plaintiff's testator, and one Serrett. On that date, Wearman bought out the interest of his partner, and a bill of sale therefor was given in the name of the defendant. A notice of the dissolution of the partnership and of his intention to continue the business, was thereupon published in a newspaper by Wearman. From the date of the purchase to the time of his death, Wearman continued in the sole possession of the property. Several months prior to his death, he made a bill of sale of the property to the defendant, but still continued in its sole possession, and carried on the business in his own name. The further facts are stated in the opinion.

E. G. Fuller, and S. M. Bliss, for Appellant.

J. H. Craddock, for Respondent.

SEARLS, C.—This is an action by the plaintiff, as executrix of the last will of William Wearman, to recover from the defendant damages for the conversion of certain personal property belonging to the estate of deceased.

Plaintiff had judgment for two thousand dollars and costs, from which judgment defendant appeals.

At the outset of the trial, defendant objected to the introduction of any evidence in support of the claim of plaintiff, upon the ground that he had served upon plaintiff's attorney a notice calling for a bill of particulars, which had not been furnished as required by section 454 of the Code of Civil Procedure. The objection was overruled by the court, and an exception taken.

1. There is nothing in the bill of exceptions to show that any demand for a bill of particulars was ever made.

If defendant desired to avail himself of the benefit of his exception, it was incumbent on him to so embody the facts upon which the ruling was based in his bill of exceptions that this court could with all the facts before it pass upon the question.

The complaint was defective in that it did not describe with sufficient particularity the goods alleged to have been converted by defendant, and in the face of a special demurrer for that cause, could have been held bad; but it stated a cause of action, and no objection having been made on the ground indicated, it was sufficient.

The notice of dissolution of the firm of Wearman & Serrett, and that Wearman would thereafter conduct the business, etc., was properly admitted in evidence. As published in the newspaper, this notice was such a public declaration as may reasonably be supposed to have come to defendant, and was a circumstance proper to be considered in determining who was conducting the saloon business, and in whose possession the disputed property remained after the dissolution.

Like considerations apply to the admission of the evidence of Marcuse and others, tending to show that they sold goods to Wearman in his own name, and to introduce their bills for such goods to show they were charged to said Wearman individually, and not to defendant.

As evidence that the business was conducted by Wear-

man ostensibly for himself and in his name, and not for or in the name of defendant, the evidence was proper.

The evidence as to the ownership of the property was conflicting, and we are not warranted in disturbing the findings on the ground that they are not supported by evidence.

There was evidence tending to show that notwithstanding the sale of the property to the defendant, as claimed by her, such sale was not accompanied by an immediate delivery and followed by a continued change of possession of the things transferred; and as a consequence of these facts, if they existed, the sale was void, not only as against creditors, but also as against any person on whom the estate of Wearman, the vendor, devolved in trust for the benefit of others than himself. (Civ. Code, sec. 3440.)

Plaintiff, as the executrix of the last will of William Wearman, deceased, the vendor of defendant, is a trustee in whom the estate vests for the benefit of others within the meaning of the code.

There was not a delivery and continued change of possession of the property within the meaning of the rule enunciated in *Stevens v. Irwin*, 15 Cal. 503, S. C., 76 Am. Dec. 500, which has been steadily adhered to in this state as a correct exposition of the law in numerous cases. (*Dean v. Walkenhorst*, 64 Cal. 78; *Watson v. Rodgers*, 53 Cal. 401; *Wiedeman v. Frank*, 2 West Coast Rep. 376; *Grum v. Barney*, 55 Cal. 254.)

There was no error in excluding the evidence offered on behalf of the defendant to show that she and Wearman lived together as husband and wife.

If she desired to show coverture, it was incumbent upon her to plead it.

In her answer she avers: 1. "That her true name is Margaret Murphy Wearman"; 2. That she owned and possessed the goods and chattels in her own separate right, "and controlled the same as her separate property,

independent of her husband, the said William Wearman, now deceased."

Beyond these expressions, there is nothing in the pleadings to show that the relation of husband and wife existed between defendant and plaintiff's testator.

As allegations showing the relation of husband and wife, they are wholly insufficient.

Again, the offer to prove that defendant and plaintiff's testator lived together as man and wife was not an offer to prove marriage. (*Letters v. Cady*, 10 Cal. 533.)

Marriage being properly averred, the evidence indicated would tend to prove the fact,—nothing more.

Taking the pleadings with the proffered testimony, and the only inference we can draw from them is, not that defendant desired to show that she had intermarried with the deceased, but that they had lived together as man and wife.

We are of opinion the judgment should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 11557. Department Two.—August 31, 1886.]

JAMES W. SHEALOR, PETITIONER, *v.* SUPERIOR COURT OF AMADOR COUNTY, RESPONDENT.

JUSTICE'S COURT — ACTION FOR POSSESSION OF PERSONAL PROPERTY — ALLEGATION OF VALUE — JURISDICTION. — Neither the Justice's Court nor the Superior Court on appeal has jurisdiction of an action to recover the possession of specific personal property alleged to exceed three hundred dollars in value, although the complaint prays judgment for a less amount in case possession cannot be had.

APPLICATION for a writ of review. The facts are stated in the opinion of the court.

Eagon & Armstrong, for Petitioner.

A. Heath, and Rust & Caminetti, for Respondent.

The COURT.—In this cause, the plaintiff brought his action in a Justice's Court to recover various articles of personal property, the aggregate value of which, as averred in the complaint, amounted to \$319. The prayer of the complaint was: "1. For the possession of said goods, or for \$299 in case possession cannot be had; 2. For \$150 damages for the detention thereof, and the costs of the action."

The cause came on to be tried, when the defendant moved that the cause be dismissed on the ground that the demands of the plaintiff exceeded the jurisdiction of the court.

The Justice's Court dismissed the action.

The plaintiff then took an appeal to the Superior Court above named on questions of law and fact.

The Superior Court, against the objection of defendant, proceeded to try the case; he did try it, and rendered a judgment for the plaintiff.

The value of the property having been averred in the complaint to be \$319, for which possession was asked, neither the Justice's Court nor the Superior Court on appeal had jurisdiction of the action.

The judgment of the Superior Court must be annulled and quashed.

So ordered.

[No. 11596. Department Two.—August 31, 1886.]

SWAMP LAND DISTRICT NO. 307, RESPONDENT, *v.*
WILLIAM GWYNN ET AL., APPELLANTS.

SWAMP LAND — RECLAMATION — VIEW BY COMMISSIONERS — —JOINT VIEW NOT NECESSARY. — Under section 3456 of the Political Code, the commissioners appointed to make an assessment for the reclamation of swamp land need not act jointly in viewing the lands within the district.

ID. — SUFFICIENCY OF VIEW — FINDING — EVIDENCE. — The court found that the lands in the district, and each and every tract thereof, were viewed by the commissioners. At the time of the view, the lands were mostly covered with water, but the commissioners were at a point where they could look over the whole area of the district and see every part of it, except a few small parcels along its eastern margin, which were hidden from view by trees. *Held*, that the finding was sustained by the evidence, and that the view was not insufficient in point of law.

ID. — ASSESSMENT ROLL — EVIDENCE TO CONTRADICT — ARBITRARY ASSESSMENT. — Conceding that the assessment roll of a swamp-land district, when properly certified by the commissioners, becomes an official record within the meaning of sections 1920 and 1926 of the Code of Civil Procedure, and evidence of all the facts recited in it, still it is only *prima facie* evidence, and may be contradicted by showing that the assessments were arbitrarily made without reference to the proportionate benefits to be derived to each piece of land assessed by reason of the proposed work.

ID. — SATISFACTION OF ASSESSMENT — TENDER OF WARRANT OF DISTRICT. — The defendants tendered in payment of the assessment a warrant of the district for a larger sum than the amount of the assessment. The warrant was owned by a third person, and was tendered only for the purpose of having the assessment indorsed thereon, and was not intended to be given up and canceled. *Held*, that the tender was not a satisfaction of the assessment under section 3465 of the Political Code.

APPEAL from a judgment of the Superior Court of Yolo County, and from an order refusing a new trial.

The action was brought to enforce an assessment for the reclamation of swamp land. Prior to and at the trial the defendants tendered a warrant of the district in payment of the assessment. The tender purported to be made in conformity with section 3465 of the Political Code, which provides that the assessments may be paid "in warrants of the district, drawn by order of the trustees thereof, and approved by the board of supervisors. Where payment is made in the warrants of the district, legal interest

must be computed thereon from the date thereof to the time of such payment, when said warrants must be surrendered to the treasurer, and by him cancelled." The further facts are stated in the opinion.

W. H. Beatty and S. C. Denson, for Appellants.

Armstrong & Hinkson, for Respondent.

BELCHER, C. C.—This is an action to enforce payment of an assessment made for reclamation of swamp lands.

The plaintiff recovered judgment, from which, and an order refusing a new trial, the defendants appeal.

1. Under the provisions of the code, when an assessment for swamp-land purposes is to be made, three commissioners must be appointed, who are disinterested persons and residents of the county, "and who must view and assess upon the lands situated within the district a charge proportionate to the whole expense, and to the benefits which will result from such works." (Pol. Code, sec. 3456.)

Under the statutes formerly in force, the commissioners were required to jointly view the land, and failing to do that, their assessment was void. (*People v. Coghill*, 47 Cal. 361; *People v. Hagar*, 49 Cal. 229.) Now they are not required to act jointly in viewing the lands. It is sufficient if, as they did here, two go together and the other alone to view it.

But if this be so, it is urged that they did not sufficiently view the land to enable them to make a valid assessment. The court found that they viewed all the lands in the district, and each and every tract thereof, and there was evidence, we think, tending to sustain the finding. It is true, the lands were mostly covered with water, but the commissioners were at a point where they could look over the whole area of the district and see every part of it, with the exception of a few small parcels

along its eastern margin, which was hidden from view by trees. Their duty was to make such an examination of the lands of the district as would enable them to form an intelligent judgment as to the benefits which each part would receive from the completed works of reclamation, and as matter of law we cannot say that they failed to perform their duty.

2. It is alleged in the complaint that the commissioners, after viewing each tract of land, assessed upon the same charges proportionate to the entire expense and the benefits which would result to each tract from the works of reclamation, and on the same day made a list of the charges assessed by them, etc.

The defendants by their answer denied that the commissioners assessed upon the several tracts of land charges proportionate to the entire expense, and to the benefits which would result to each tract from the works of reclamation. And they alleged that the commissioners did not make any examination, computation, or estimate as to the result or effect of the proposed work of reclamation upon each tract of land in the district, but arbitrarily assumed that each and every acre of land in the district should be assessed for an equal share of the entire sum to be raised; and without considering whether some tracts would be benefited by the proposed work more or less than other tracts, arbitrarily assessed each tract at the same rate per acre, when in fact some tracts, if the proposed works should be carried out and completed, would be greatly benefited and enhanced in value, while other tracts would be benefited very little, if at all. And they further alleged that the assessment was unfair, unequal, and unjust to the defendants, for that the lands described in the complaint would not be benefited to the same extent as other lands of other owners in the district.

At the trial, the plaintiff, after introducing certain preliminary proofs, offered in evidence the assessment roll,

with the certificate attached thereto, signed by the commissioners. Among other things, the commissioners certify that "we did view said lands, and assess said sum of thirty-nine thousand dollars as a charge upon the lands within said district for the purpose of completing the reclamation of said district, which charge was and is made proportionate to the whole expense, and to the benefit which will result from such works of reclamation.

The defendants objected to the assessment roll being received in evidence, and in support of their objection sought to prove by one of the commissioners that in making the assessment and apportioning the money to be raised among the several tracts of land in the district, the commissioners never considered, discussed, or in any way referred to the proportional benefits to be derived to each piece of land by reason of the work to be done for which the assessment was levied, but arbitrarily, and without considering the question of benefits to any piece of land in the district, assessed an equal sum upon each acre, in obedience to what they understood to be a by-law of the district; and further, that some of the tracts of land in the district would be benefited very much more than other tracts by the work of reclamation. The plaintiff objected to each of the several questions asked upon the ground that it was irrelevant, immaterial, and incompetent, and the court sustained the objection, the defendants reserving an exception. Thereupon the court overruled the objections to the assessment roll and admitted it in evidence, and the defendants excepted to that ruling.

It was proved that about ten days after viewing the land, the commissioners met at the office of the attorney for plaintiff, and found the assessment roll there, and nearly written up; that the attorney then, under their instructions, computed the amount to be charged against each tract, and entered the same on the roll, and that thereupon they signed the certificate.

It is argued for the respondent that when the commissioners signed the certificate the assessment roll became a record of official acts, and could not afterward be impeached or questioned, except for fraud. And in support of this contention, among other authorities, sections 1920 and 1926 of the Code of Civil Procedure are called to our attention. Those sections read as follows:—

“1920. Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by any other person in the performance of a duty specially enjoined by law, are *prima facie* evidence of the facts stated therein.”

“1926. An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is *prima facie* evidence of the facts stated in such entry.”

Conceding that when the commissioners signed the certificate it became an official record and evidence of all the facts recited in it, still it was only *prima facie* evidence, and as such was subject to be contradicted.

“*Prima facie* evidence is that which suffices for the proof of a particular fact until contradicted and overcome by other evidence. For example: the certificate of a recording officer is *prima facie* evidence of a record, but it may afterward be rejected upon proof that there is no such record.” (Code Civ. Proc., sec. 1833.)

The commissioners were required to assess upon the lands “a charge proportionate to the whole expense, and to the benefits which will result from such works.”

When special duties are enjoined upon commissioners, as in this case, the law must be strictly complied with, and any substantial departure from its requirements will render their acts void. (*People v. Coghill*, 47 Cal. 361; *People v. Hagar*, 49 Cal. 229; *People v. Ahern*, 52 Cal. 208.)

We think that, notwithstanding the certificate signed by the commissioners, the defendants were entitled to prove, if they could, that the assessment involved in this case was

not made in conformity to the requirements of the law, and so was not binding upon them, and that the court erred in excluding the proper evidence.

3. Without expressing any opinion as to the validity of the warrant tendered in satisfaction of the assessments sued for, we think the court did not err in finding that the assessments were not in fact satisfied by the tender.

As pleaded and proved, the warrant was for a larger sum than the aggregate amount of the assessments, and was owned by D. O. Mills & Co., a banking corporation doing business at Sacramento.

Under some arrangements made with the defendants, it was tendered to the county treasurer only for the purpose of having the assessments indorsed upon it, and not to be given up and canceled. This was not sufficient. (Pol. Code, sec. 3465.)

Nor was the tender in court at the trial of any avail. Such a tender is not authorized by any statute that we are aware of.

For the error above noted, the judgment and order should be reversed, and the cause remanded for a new trial.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded for a new trial.

[No. 9763. In Bank.—August 31, 1886.]

SIERRA UNION WATER AND MINING COMPANY,
APPELLANT, *v.* B. F. BAKER, RESPONDENT.

AGREEMENT TO FURNISH WATER — CONSTRUCTION. — A certain agreement, stated in the opinion, whereby the assignors of the plaintiff contracted to furnish, deliver, and sell water to the defendant, construed with reference to the elevation at which the water should be delivered.

INSTRUCTIONS — EXCEPTION. — A party cannot except to instructions given at his own instance.

ID. — CONTRADICTORY INSTRUCTIONS — RECORD MUST SHOW EXCEPTION — APPEAL. — Contradictory instructions are erroneous, but the error will not be considered on appeal, unless the record shows that an exception was taken to the instructions at the trial.

APPEAL from a judgment of the Superior Court of Sierra County, and from an order refusing a new trial.

The facts are stated in the opinion of Mr. Justice Thornton.

S. B. Davidson, I. S. Belcher, and T. C. Van Ness, for Appellant.

Van Cleaf & Gear, for Respondent.

THE COURT. — For the reasons given in the opinion heretofore filed, the judgment and order are affirmed.

The following is the opinion above referred to, rendered in Department Two on the 22d of October 1885.

THORNTON, J. — By a deed bearing date the fifteenth of February, 1871, the Sears Union Water Company, a corporation organized under the laws of the state of California, sold and conveyed to W. R. Morgan and Timothy Donahue, together with other property, the Trainor ditch, situate in Table Rock and Sears township, county of Sierra, and state aforesaid. The ditch is described in the deed aforesaid as conveying the water of Slate Creek and its tributaries to St. Louis, Sierra County, with all its ravines, dams, flumes, reservoirs, and water privileges be-

longing and appertaining thereto, and also all their interest in the water known as tail-water, flowing from Table Rock township in the county above named.

On the 30th of September, 1880, the above-named Morgan and Donahue, parties of the first part, entered into an agreement in writing with defendant Baker, party of the second part.

[NOTE.—Daniel Titus was also a party of the second part with Baker, but as he was let out of the contract by a subsequent agreement, and never had any interest in the action, when the party of the second part is hereinafter mentioned, defendant Baker alone is referred to.]

By the agreement just mentioned, the parties of the first part, for a consideration expressed therein, agreed with the party of the second part (who at the date above mentioned claimed to own, and was engaged in mining for gold on, certain placer mining claims situate near Sawmill Ravine in Sierra County, in this state, known as the Pioneer mine, operating the mine by the hydraulic process, and requiring for such operation large quantities of water) to construct and at all times maintain at their own expense a ditch of sufficient size and capacity to carry and convey all the waters of the parties of the first part from St. Louis in the county above named to a point on Sawmill Ravine. The ditch so to be constructed was to connect with, take and receive the water from all the ditches then owned or controlled by the parties of the first part at or near St. Louis, and to convey it to a point or place on Sawmill Ravine at a sufficient height or elevation so that the water might be conducted therefrom to the new reservoir at the Pioneer mine, and to deliver continuously all this water through said ditch to Baker at the point above referred to on Sawmill Ravine.

It was further agreed that the ditch should be kept to its full capacity unless prevented by heavy snows, with the exercise of due vigilance, at all seasons of the year,

as long as the parties of the first part should have sufficient water to fill it, and at all other times to supply Baker with all the water belonging to them.

It was declared in the agreement that its object and purpose was to sell and deliver to Baker, at the point or place above mentioned on the Sawmill Ravine, all the water from the ditches owned or controlled by the parties of the first part at or near St. Louis, which water Baker desired to use on the Pioneer mine in working and developing it.

By a subsequent agreement, supplementary to and in extension of the foregoing, between the same parties, bearing date the 3d of January, 1882, and to take effect on the 30th of September following, until which the provisions of the former agreement as to the furnishing of water were to remain in force, the parties of the first part agreed to furnish to the party of the second part, defendant Baker, in addition to the water to be furnished under the former agreement, the water from the Sackett's Gulch ditch, the Emery & Pfarr ditch, the William Stahl ditch, and the S. McCrory ditch. In this latter agreement, the parties declare the intent and purpose of it to be that the parties of the first part shall, when required for the use of the Pioneer mine, furnish to Baker all the water they now have in the county of Sierra, to the present capacity of their ditches, for the exclusive use of Baker, from and after the 30th of September, 1882, until the 30th of September, 1885, and in the mean time, and until the 30th of September, 1882, they are to furnish Baker water under the former agreement.

In consideration of the furnishing of said water, Baker agreed to pay Morgan and Donahue annually after the 30th of September, 1882, the sum of sixteen thousand dollars out of the first proceeds of the Pioneer mine.

This other provision in the contract should also be mentioned. It is as follows:—

"It is further understood and agreed that the so-called tail-water from Table Mountain township, which is furnished by the Sears Union water ditch, is a portion of the water to be furnished under this contract; and that in case of failure of the party of the first part to procure said tail-water during the period of this contract, that a reasonable deduction shall be made on account of such failure, to be mutually agreed upon between the parties hereto," etc.

Pursuant to the first agreement, Morgan and Donahue constructed the ditch required to convey the water contracted to be delivered for the use of the Pioneer mine.

On the 20th of November, 1882, Morgan and Donahue assigned the two contracts of date of the 30th of September, 1880, and the 3d of January, 1882, above mentioned, to the plaintiff, and also conveyed all their property, including the Trainor ditch, located in the county of Sierra. In the same month, the Sears Union Water Company conveyed to plaintiff all its ditches and mining properties located in the county last named.

The action is brought to recover of defendant sixteen thousand dollars for water alleged to have been furnished him under the above contracts during the water season of 1883.

It is averred in the complaint that Morgan and Donahue duly performed all the conditions of the afore-mentioned contracts on their part to be performed until the assignment to plaintiff above set forth, and since that time plaintiff has duly performed such conditions.

The defendant denies the due performance of the terms of the contract by plaintiff or its assignors, and specifically denies the furnishing and delivery of the tail-water described in the last agreement, and of the other waters mentioned in the agreement, to defendant as agreed on, either by Morgan and Donahue, or either of them, or by the plaintiff, at any time since the third day of January, 1882.

On the trial, the plaintiff requested the court to give the following instruction: "There is not in this state, strictly speaking, an absolute ownership of running water. Such water is in its nature incapable of ownership in the same sense in which one is said to own or possess other personal property. The ownership is of the use of the water. Under the deed of 1871 from the Sears Union Water Company to Morgan and Donahue, and the contract between Morgan and Donahue and the defendant, there was conveyed to the latter such tail-water as the said Morgan and Donahue had by virtue of the said deed. So long as such tail-water did or could flow into the Trainor ditch, the plaintiff here, as successor in interest to Morgan and Donahue, could not divert it.

"But the plaintiff was not under the terms of that contract obligated to put such tail-water into the Trainor ditch near or at points where it did not naturally flow into it. When such water flowing down a ravine naturally passed underneath the Trainor ditch, the plaintiff was not obligated to build a new dam or ditch for the purpose of putting such water into the Trainor ditch. If the defendant Baker was entitled to the water, and desired to take it up at such points, it was his duty to put himself in a position to receive it, and until he did put himself in such position, he cannot complain if the plaintiff used the water.

"Until the defendant Baker, the claimant of this water, was in a position to use it, the right to the water or water right did not exist in such sense that the mere diversion and use of it by the plaintiff was a ground of action, either to recover the water, or for damages for the diversion. If from the evidence you find that the defendant was entitled to the use of certain tail-water, but that said water would or did naturally flow by or under the Trainor ditch, and the defendant never put himself in a position to receive that water, then in that case the plaintiff had a right to take up and use such water until

such time as defendant had placed himself in a position to receive it."

The court gave that portion of the instruction concluding with the words "could not divert it," and refused the remainder.

The plaintiff reserved an exception to the refusal of the court to give the whole instruction as asked, and to its modification.

We cannot see that the court committed any error in giving that portion of the requested instruction which it did give of which the plaintiff can complain. The first three sentences in the direction given relate to the character of the ownership or property in water in this state; and while they may be correct statements of law, are totally irrelevant to anything contained in this case. There was no controversy herein between the parties as to the character of the ownership of water by Morgan and Donahue or by plaintiff, or whether it was conveyed to Morgan and Donahue by the Sears Union Mining Company; but the controversy related to the point whether plaintiff or its assignors had complied with the contract by which they and it were bound to furnish and deliver certain water to the defendant.

How Morgan and Donahue got their title or ownership to the water they had agreed to furnish and deliver was a question certainly outside of the case. If they had agreed to furnish and deliver the tail-water mentioned in the instruction, they and the plaintiff claiming under them were bound to do so; if they had not so agreed, neither they nor plaintiff were bound to furnish and deliver it.

We will add here that there is an incorrect statement in the portion of the instruction given. The statement referred to is, that under the deed of 1871 from the Sears Union Water Company to Morgan and Donahue, and the contract between Morgan and Donahue and the defendant, there was conveyed to the defendant such tail-

water as the said Morgan and Donahue had by virtue of the said deed. This statement, in point of fact and law, is incorrect.

We look in vain for any conveyance of any water by Morgan and Donahue to defendant. There is no such conveyance in the agreements between them, which have been, as to all material points, fully set forth above. Morgan and Donahue's contract was to furnish and deliver and sell certain water to the defendant in the manner stated in the agreements, but nowhere was there a conveyance of any water to the defendant.

If the foregoing views are correct, and we think they are, the court below committed no error prejudicial to plaintiff in giving the portion of the instruction above set forth. It may be that defendant was prejudiced by the ruling of the court as to this matter, but we cannot see any prejudice to plaintiff.

As to the portion of the instruction refused, the propositions contained in it could not have been approved by the court and given in its charge to the jury without falling into palpable error.

To show this, it will be necessary to repeat to some extent what has before been stated herein. The water which was the subject of the aforementioned agreements entered into by Morgan and Donahue was acquired by them from the Sears Union Water Company. By the deed of the 15th of February, 1871, the company above named sold and conveyed to Morgan and Donahue the Trainor ditch, with its tributaries, ravines, dams, flumes, reservoirs, and water privileges, and all their interest in the water known as tail-water flowing from the Table Rock township.

It is evident from the perusal of the agreements of Morgan and Donahue with defendant, above set forth, that the tail-water claimed by them under the deed from the Sears Union Water Company is a portion of the water to be furnished under the above-mentioned con-

tracts of Morgan and Donahue with defendant. This water, it appears from the agreement of the 3d of January, 1882, was also furnished to Morgan and Donahue by a ditch known as the Sears Union water ditch. Morgan and Donahue further stipulated (see agreement of the 30th of September, 1880) with defendant to construct and maintain, at their own expense, a ditch of sufficient size and capacity, not exceeding a limit specified in the agreement, to carry all the water belonging to them from St. Louis to a point or place on Sawmill Ravine, said ditch to connect with and to take and receive the water from all the ditches now owned or controlled by Morgan and Donahue at or near St. Louis, and to convey the said water to a point or place on the Sawmill Ravine, at such height or elevation that such water might be conducted therefrom to the new reservoir on the Pioneer mine, and to deliver continuously all said water through said ditch to the defendant at the said point or place on the Sawmill Ravine.

The object and purpose of the agreement is declared in the agreement of the 30th of September, 1880, and is set out above. All the obligations of Morgan and Donahue imposed by their agreements are equally binding on the plaintiff herein, as they were assumed by it.

A consideration of the foregoing stipulations shows that the court was correct in refusing to give the portion of plaintiff's second instruction which it requested.

That the plaintiff was bound by the foregoing agreements to maintain the ditch for the delivery of water through it at a point or place on Sawmill Ravine, which ditch was to connect with, take, and receive the water from all the ditches owned by Morgan and Donahue at or near St. Louis on the 30th of September, 1880, and to convey this water continuously through this ditch to a point or place on the ravine mentioned, at such an elevation that such water might be conducted therefrom to the new reservoir at the Pioneer mine, which was defendant's mine, is

so clearly manifest that it cannot be made more so by argument or illustration. This being so, it clearly follows that all the propositions in the rejected portion of the instruction were utterly discordant with any correct view of the case.

The proposition contained in such rejected request, that the plaintiff was not bound to put the tail-water referred to in the foregoing agreements into the Trainor ditch, near or at points where it did not actually flow into it, is entirely irrelevant to any issue involved herein. The plaintiff never contracted to put any particular tail-water or other water into the Trainor ditch, but it was bound by the contracts to take and receive all the water, including the tail-water, from the ditches owned and controlled by its assignors on the 30th of September, 1880, and to deliver them continuously at a point on Sawmill Ravine, that such water might be conducted from the point last named to the new reservoir on the Pioneer mine. The proposition above stated, and with which the portion of the request rejected begins, is entirely different from this, and such proposition is entirely foreign to any stipulation in the contracts mentioned. Admit everything that is affirmed by it to be true, and it lends no aid to a solution of the questions involved in this case.

The same is true of every other proposition involved in the rejected portion. The defendant was not bound to put himself in a position to receive any water that flowed underneath the Trainor ditch. The plaintiff was bound to deliver all water at the point on Sawmill Ravine, mentioned above, from which it might be conducted to the defendant's reservoir at the Pioneer mine, and plaintiff could not without a violation of its contract suffer the tail-water referred to in the contract to run off and to waste in a ravine which ran under the Trainor ditch, or to use it for its own profit.

The court, in our view, very properly refused the portion of the request which it was asked to give.

The plaintiff contends that the second instruction given at request of defendant is contradictory of the third instruction given at request of plaintiff, and that the third and fourth instructions given at request of defendant are contradictory of the fourth and sixth instructions given at request of plaintiff.

To this it may be said that the instructions just mentioned as given at request of defendant were not excepted to. Of course, plaintiff would not and could not except to instructions given at its instance. In this state of the case, the point as to a conflict between the instructions is not before us for determination. If contradictory instructions are given, the court commits an error of law, and such an error must be excepted to when the ruling is made, or it cannot be considered. (Code Civ. Proc., sec. 646.) Where, as in this case, on appeal from the judgment and the order denying a new trial, the statement on motion for a new trial fails to show that an exception was reserved to errors of law committed by the court on the trial, no question as to such errors comes before this court for examination.

We find no error in the record, and the judgment and order must be affirmed.

So ordered.

[No. 9719. In Bank.—August 31, 1886.]

JOHN McKAY, APPELLANT, *v.* ALONZO JOY, ADMINISTRATOR ETC. OF J. A. JOY, DECEASED, RESPONDENT.

PARTNERSHIP — ACCOUNTING — SURVIVING PARTNER CANNOT MAINTAIN ACTION FOR. — A surviving partner cannot maintain an action against the personal representative of his deceased partner for an accounting of the partnership affairs.

APPEAL from a judgment of the Superior Court of Amador County.

The facts are stated in the opinion of the court.

A. C. Brown, for Appellant.

Eagon & Armstrong, for Respondent.

The COURT. — Bill filed by a surviving partner against the administrator of his deceased partner for an accounting. The complaint alleged that there never had been any settlement or accounting between the plaintiff and the deceased before the death nor since with the defendant.

Section 1585 of Code of Civil Procedure gives to the surviving partner ample power to take possession of the property of the partnership and wind up its affairs. It necessarily follows that he does not need the interposition of a court of equity to aid him in doing that which he has ample authority to do himself.

Judgment affirmed.

THORNTON, J., dissented.

[No. 20188. In Bank.—August 31, 1886.]

THE PEOPLE, RESPONDENT, v. C. W. MYERS ET AL.,
APPELLANTS.

ROBBERY — CIRCUMSTANTIAL EVIDENCE — FOOTPRINTS. — The defendants were convicted on circumstantial evidence only of the crime of robbery. On the trial, the prosecution, as tending to show that the defendants were present at the robbery, and were the persons who committed it, gave evidence that certain boot-marks of peculiar characteristics were found the day after the robbery at the place, and were traced from that point along a trail to the residence of one of the defendants. The defendants thereupon offered to prove that on the third day after the robbery, at a place within three days' travel from the place of its commission, two men other than the defendants, but of similar appearance, were seen, and that a boot worn by one of them left marks similar to those found on the trail. The court excluded the evidence. Held, that the ruling of the court was erroneous.

ID. — MISCONDUCT OF SHERIFF — TREATING JURYMEN TO LIQUORS — NEW TRIAL. — Pending the trial, and while the jury was in his charge, the sheriff conducted the jurymen to public saloons, and furnished them with liquor at his own expense. A reward had been offered for the conviction of the defendants, which the sheriff hoped to obtain. *Held*, that the conduct of the sheriff was a sufficient irregularity to warrant a new trial.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Grady & Merriam, and *P. Reddy*, for Appellants.

Attorney-General Marshall, J. H. Daly, and *G. G. Gouch-er*, for Respondent.

MYRICK, J. — The defendants were accused by information of the crime of robbery. For two reasons the conviction must be set aside and a new trial ordered, viz.: —

1. The accused were convicted on circumstantial evidence only. The fact of the robbery was clearly proved. As a circumstance tending to show that the defendants were present at the robbery, and were the persons who committed it, the prosecution gave evidence that certain boot-marks of peculiar characteristics were found the day after the robbery at the place, and were traced from that point along a trail for about eight miles, to a gate leading into a corral at the place of residence of defendant Myers. In no other way was a boot of that description traced to the defendants. The defendants offered to prove that on the third day after the robbery, at a place more distant than Myers's residence, but within three days' foot travel, two men (other than the defendants), of about the same stature and of similar complexion, were seen, and that a boot worn by one of them left marks precisely similar to those found on the trail. This evidence was objected to. We copy from the transcript.

"The Court. — If you say your object in introducing this testimony is to identify or show that it was the defendants or either one of them that was there at that time, the court will permit the evidence.

"Defendants' counsel. — That we were there with that peculiar track? No; we don't do that. Our purpose is to show that it was not the defendants who robbed the stage.

"The Court. — Taking that view of it, the court will certainly sustain the objection."

In other words, if needed in order to more clearly present the ruling: If the evidence offered would tend to show the guilt of the defendants, it was admissible; but if to show their innocence, it was inadmissible.

2. The jury was during the trial placed in charge of the sheriff. A reward had been offered for the conviction of the defendants, and the sheriff hoped to obtain the reward. He paid out some considerable money in and about the trial, and had no expectation of being repaid therefor except in case of conviction. During the trial, and while the jury was in his charge, on at least two occasions, the sheriff conducted the jurymen to public saloons in the town and furnished them liquors at his expense. This manifest irregularity is not counterbalanced by the fact that the jurymen on one occasion were "treated" by one of their own number, and on another occasion by one of the attorneys for the defendants.

The judgment and order are reversed, and the cause remanded for a new trial.

MORRISON, C. J., MCKEE, J., SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 9625. In Bank.—September 1, 1886.]

PAUL MENK, RESPONDENT, *v.* COMMERCIAL INSURANCE COMPANY OF CALIFORNIA, APPELLANT.

FIRE INSURANCE — PLEADINGS — EVIDENCE TO CONTRADICT — REPRESENTATIONS IN APPLICATION. — The action was brought on a fire insurance policy to recover the amount of an alleged loss. The complaint averred that the policy was issued on an application made and signed by the plaintiff, which contained certain material representations as to the manner in which the building was occupied. On the trial, the plaintiff, against the objections of the defendant, testified that he did not know what representations the application contained. *Held*, that the evidence was inadmissible under the complaint.

ID. — NEW TRIAL — NEWLY DISCOVERED EVIDENCE. — The defendant moved for a new trial on the ground of newly discovered evidence, in support of which it presented the affidavit of its agent contradicting the evidence of the plaintiff given at the trial, and tending to show that the representations contained in the application were made by him. *Held*, that a new trial should have been granted.

APPEAL from a judgment of the Superior Court of Nevada County, and from an order refusing a new trial.

The action was brought on a fire insurance policy to recover the amount of an alleged loss. The further facts are stated in the opinion of the court.

Olney & Byrne, and *A. B. Dibble*, for Appellant.

Walling & Gaylord, for Respondent.

The COURT. — In effect, the complaint alleged that the policy of fire insurance sued on was issued on an application made and signed by the plaintiff. The application contained certain material representations as to the manner in which the building was occupied. The plaintiff, against the objection and exception of the defendant, was permitted to testify at the trial, in effect, that the application was in fact made by an agent of the defendant, of the name of Burckhalter, and that he (plaintiff) did not know what representations it contained. In the first place, that testimony was in contra-

diction of the averment of the complaint, and should have been ruled out. But it was not, and the plaintiff recovered in the action. The defendant moved for a new trial, among other grounds upon the ground of newly discovered evidence; and in support of the last-mentioned ground, presented the affidavit of Burckhalter, in which the statements of the plaintiff at the trial were put in issue, and tending to show that the representations contained in the application were in fact made by the plaintiff.

As they were material, and were claimed by defendant to have been false, defendant was entitled to an opportunity to show that they were made by plaintiff, for the policy was issued in part upon them. Defendant did not have an opportunity of producing the proof at the trial, because it could not have been anticipated that plaintiff would be permitted to testify that he did not make the representations contained in his application, upon which it is alleged the policy was issued.

The judgment and order are reversed, and the cause remanded for a new trial.

[No. 9111. Department Two.—September 2, 1886.]

GULF OF CALIFORNIA NAVIGATION AND EXPRESS COMPANY, RESPONDENT, *v.* STATE INVESTMENT AND INSURANCE COMPANY, APPELLANT.

MARINE INSURANCE — TIME POLICY — GENERAL PERMISSION TO NAVIGATE — INDORSEMENT CONSTRUED.—The action was brought on a time policy of marine insurance to recover for a total loss. According to the terms written in the body of the policy, the vessel insured was permitted, with certain exceptions, to prosecute voyages anywhere upon the navigable waters of the globe. On the back of the policy, by agreement of the parties thereto, a written indorsement was made, as follows: "Vessel to be employed on the Gulf of California and captain is privileged to act as his own pilot without prejudice to this insurance." Held, that the effect of the indorsement was not to restrict the vessel to the Gulf of California.

ID. — **PLEADING — ALLEGATION OF TOTAL LOSS — INSUFFICIENT DENIAL.** — The complaint alleged that the vessel insured, while employed in the Gulf of California, was on a certain day totally lost by the perils of the sea. The answer denied that the vessel, while employed in the Gulf of California, was, on the day alleged, or at any other time, totally lost by the perils of the sea. *Held*, that the answer did not deny the total loss of the vessel by the perils of the sea.

ID. — VERDICT — ABDOMONMENT OF VESSEL — PROCEEDS OF SALE — PRESUMPTION OF RECEIPT BY INSURED — INSTRUCTION. — The plaintiff recovered a verdict for the amount of the policy. On the trial, the defendant asked the court to instruct the jury that the verdict should be reduced by the sum for which the vessel was sold after its abandonment, on the ground that the plaintiff was presumed to have received the proceeds of the sale, and that the defendant should have credit therefor. No issue upon this point was raised by the pleadings. *Held*, that the instruction was properly refused.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion.

Milton Andros, and Charles Page, for Appellant.

Whittemore & McKee, and George W. Towle, Jr., for Respondent.

FOOTE, C. — The plaintiff brought suit against the defendant on an insurance policy which the former had obtained from the latter upon a certain vessel. The cause being tried by a jury, the plaintiff had judgment for the amount of the policy, and from that and an order denying a new trial the defendant appeals.

According to the terms of the policy as written, without the indorsement hereafter to be noticed, it was a time policy, which during its continuance permitted the vessel insured to prosecute voyages anywhere upon the navigable waters of the globe, except that it was prohibited from using certain enumerated ports. But upon the back of the policy, by agreement of the parties thereto, these words were written and punctuated as follows: "Vessel to be employed on the Gulf of California and captain is privileged

to act as his own pilot without prejudice to this insurance."

One allegation of the complaint is: "That said vessel, while employed in the Gulf of California, was, on the ninth day of January, 1881, totally lost by the perils of the sea."

The defendant meets this statement by the following language in its answer: "This defendant, on its information and belief, denies that said vessel, while employed in the Gulf of California, was, on the ninth day of January, 1881, or at any other time, totally lost by perils of the sea."

Upon the question of the sufficiency of the denial by the defendant of the plaintiff's allegation of "a total loss of the vessel by the perils of the sea," the defendant in its brief at page 6 says: "We are prepared to admit that the denial would be insufficient in this case if the action had been on a policy which covered the vessel generally against perils of the sea," citing *Doll v. Good*, 38 Cal. 289, 290; 1 Wait's Practice, 422.

The plaintiff contends that its right to recover did not depend upon the fact that the total loss of the vessel took place in the Gulf of California, but by reason of the fact that it had a right to recover in case of such loss whether it took place in the Gulf of California or in any other navigable waters not prohibited to the vessel in the policy.

And that the defendant's denial in the form in which it was stated admitted a total loss of the vessel by the perils of the sea, which is claimed, and not that it took place in said gulf, was the material issue raised by the pleadings.

So that the main question in this case, and that upon which all the others raised by the parties really depend, is, What construction is properly to be placed upon the words of the written indorsement on the policy? The last words of it are, "without prejudice to this insurance."

The natural inquiry is, What privilege or privileges were to be conceded "without prejudice to the insurance"? and what else, if anything, did the sentence contain?

It was unpunctuated save by a period at the end thereof.

We are of opinion that its meaning was either that while the vessel was employed in the Gulf of California her captain might act as her pilot "without prejudice to the insurance," or that permission, already granted in the body of the policy, to navigate the Gulf of California, was again given in the written indorsement, and that the captain might while so navigating the ship act as her pilot "without prejudice to the insurance."

It is much more reasonable to suppose one of these two to be the proper interpretation of the language in question than the one for which the defendant contends, viz., that the vessel was thereby restricted from all the waters which it was privileged to navigate in the body of the policy, and confined by the indorsement to the Gulf of California as its navigable waters, where its captain was privileged to act as pilot.

Where so important and material a restriction, opposed, too, to the terms of the original contract, is intended to be made, it would seem that such intention, in order to bind the insured, should be expressed in plain and unambiguous terms.

The construction which the defendant asks to have placed upon the words of the indorsement, taking all those words as written and punctuated, seems to us to be strained and unnatural. The circumstances, also, that surround the transaction are, we think, not calculated to induce the belief of the correctness of the defendant's construction of the language of the indorsement.

The plaintiff already had the right before that indorsement was made to navigate with its vessel the Gulf of California, but we may well suppose that it desired its

captain to act while in those waters as the ship's pilot, and that it sought the modification of the policy with such end in view.

And that must have been the prime object, for it did not need any permission, as we have seen, to run its vessel in said gulf; that it already possessed, and it should not be presumed under such state of facts that this permission was given as asked, but only on condition that the other waters in which the vessel had been originally permitted to voyage should be entirely abandoned, unless such an intention had been most plainly and unmistakably expressed.

Nor can we believe that either of the parties to the modification of the policy at the time it occurred had such an understanding of its terms as that for which the defendant contends; for, had that been the case, the restrictive words, if any such were intended, would have been made as plain of comprehension as are those granting a privilege, and that they were not so is additional evidence in favor of the plaintiff's contention.

We think, therefore, considering the terms of the policy, which is made a part of the complaint, and the averments of that pleading, that the denial of the defendant was an admission of the truth of the material fact that the vessel was totally lost by perils of the sea, against which the defendant had insured her, and that the fact of her being lost or not in the *Gulf of California* was immaterial.

The defendant also contends that the court should have instructed the jury that plaintiff's verdict should be reduced by the sum of \$610, claiming that this sum of money, which was the proceeds of the sale of the abandoned vessel, was presumed to have been received by the plaintiff, and defendant should have credit therefor.

But there was no averment in the answer of any such liability of the plaintiff, or the facts out of which it grew.

And the allegation in the complaint of non-payment by the defendant of the plaintiff's demand was not denied in the answer, nor was any payment to the plaintiff of any sum of money whatever therein averred.

Thus no issue upon this point existed or was made up upon which evidence could properly have been submitted to the jury, or upon which they should have been instructed by the court.

The instruction was therefore properly refused.

The propriety of the refusal by the trial court of the motion for nonsuit, to grant the defendant's instructions, and the granting of those given to the jury, and its order denying the motion for a new trial, all depended upon the questions above discussed.

Hence the judgment and order last mentioned should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

THE COURT. — For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

[No. 8905. Department Two. — September 2, 1886.]

WILLIAM H. WARE, RESPONDENT, *v.* ROBERT WALKER, APPELLANT.

PLEADINGS — AMENDMENT — DISCONTINUANCE OF PARTIES — CHANGE OF NATURE OF ACTION. — The action was originally brought by several plaintiffs against the defendant Walker and others, to restrain Walker from interfering with certain water rights owned by the plaintiff, Ware. The defendants other than Walker were joined as such because they refused to become plaintiffs. An amended complaint was subsequently filed, in which Ware alone was named as plaintiff, and Walker as defendant. *Held*, that the amended complaint did not change the nature of the action.

WATER RIGHTS — PUBLIC LANDS — APPROPRIATOR MAY REMOVE OBSTRUCTIONS FROM STREAM. — An appropriator of the waters of a

natural stream flowing through public lands of the United States has a right, as against a subsequent purchaser from the United States, to go upon the land of such purchaser higher up the stream than the point of diversion, and remove obstructions from the bed of the stream, so as to cause its waters to flow in their natural channel to the point of diversion.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order refusing a new trial.

The facts are stated in the opinion.

J. Alexander Yoell, for Appellant.

S. O. Houghton, for Respondent.

Foote, C. — The plaintiff obtained a final decree in this action, perpetually enjoining the defendant Walker from interfering with the ditch or dam of Ware or his associates in the bed of the Arroyo de Los Gatos, upon the land of the defendant, or from obstructing the flow of the water of said arroyo into said ditch, and for costs.

From that judgment, and an order refusing him a new trial, the defendant appeals.

His first contention is, that the court erred in not granting his motion to strike out the second amended complaint filed in the action.

It appears that the cause of action, to wit, the interference of the defendant with certain water rights of the plaintiff, and a certain ditch and dam in which he had an interest, by obstructing the flow of the water therein from the Arroyo de Los Gatos, from which it was appropriated by plaintiff, was the same cause of action as stated in all the complaints, three in number, filed in the action. And the remedy of injunction was prayed for in all of them. Further, it appears that originally the action was brought by several plaintiffs against the present and other defendants, such other defendants being joined because they had not voluntarily become parties plaintiff, although no injury was alleged to have been done

by them, that being wholly charged against defendant Walker.

The first complaint was demurred to, and the demurrer sustained. An amended complaint was then filed, which was also demurred to, and the demurrer sustained. A second amended complaint was then filed, wherein Ware alone was named as plaintiff, and Walker alone as defendant. That complaint the defendant moved to strike out because it was not, as he claimed, a complaint proper to the original action, not being between the same parties or stating the same cause of action.

The cause of action, as we have seen, was certainly the same. The fact that by reason of the demurrer which the defendant filed, and which was sustained, the plaintiff was compelled to discontinue his action as to all the plaintiffs who had not a joint cause of action with Ware, cannot be just cause of complaint by the defendant, for his objection obliged the plaintiff thus to frame his pleading.

And the fact that the cause was discontinued as to those defendants brought in because they could not be made to join as plaintiffs, but against whom no cause of action was ever stated, was a mere discontinuance as to them, to which proceeding Walker had no legal right to object. (*Brown v. Davis*, 15 Cal. 11, 12.)

Therefore the motion to strike out had no merit, and was properly denied.

There was evidence to support all the findings, and hence they should not on appeal be disturbed. (*Trenor v. C. P. R. R. Co.*, 50 Cal. 230.)

It is urged by the appellant that the findings do not support the judgment.

By them it was substantially declared, among other things, that the plaintiff with others appropriated certain water of the Arroyo de Los Gatos, at a time when the land now owned and possessed by the defendant was still the property of the United States government, and

that said water was taken out from the bed of said stream at said time with the approval of the party then in possession of said land, and who afterwards obtained a patent for it; that as part of the ditch which conducted the water to the plaintiff's land the bed of said arroyo was used; that after a time, when the defendant had become the owner of said land, he was not willing to allow the plaintiff to appropriate and use said water, and that when plaintiff undertook (by reason of the changes in the bed of the stream having diverted the flow of water away from the head of his ditch) to go higher up in the bed of said stream, which *belonged* to the defendant, and construct therein at another point on his (defendant's) land a certain dam and extension of the ditch, so as to again cause said water to flow into it, the defendant tore down the dam, and obstructed so much of the ditch as was upon his land above the original point of appropriation.

It was to prevent further action of that kind, and to maintain his control over the water thus flowing over a portion of the defendant's land, where the original ditch had not run, that the plaintiff brought the present action.

The conduct of the defendant in the premises, according to the findings, was not justifiable. The plaintiff was entitled to use the water of the stream to which he had obtained the right of appropriation prior to the defendant's ownership of the land through which the water flowed in its natural current.

All that the plaintiff did in securing to himself the continued use of the water to which he had thus become entitled was to go higher up in the bed of the stream than he had originally done, and dig out a small ditch or channel in the gravelly surface thereof through a bar that had been formed by freshets in the stream, and erect at the head of such ditch a wing-dam to divert the waters of the stream in the usual quantity that he had hitherto used

down along its bed into his original ditch. At no point where he thus used the bed of said stream (owing to the height of the banks thercof) could the defendant make any beneficial use of the water thus taken, and no portion of his land available for any useful purpose was invaded or taken. In fact, all that the plaintiff did was to remove obstructions to the flow of its waters from the bed of the stream higher up on the defendant's land than the point whence such waters could be originally diverted into the ditch.

The plaintiff did nothing more of injury to the defendant than if he had removed a number of fallen trees which might have been washed down by the floods of winter, and which had lain across the stream, obstructing the flow of the water and causing it to run upon the farther side away from the plaintiff's ditch, and such action was lawful. The plaintiff, by the construction of his ditch, and the appropriation and user of the water of the stream, acquired as against the defendant, a subsequent purchaser from the United States, as complete and perfect a right to maintain his ditch, and have the water flow to, in, and through the same, as though such right or easement had vested in him by grant. Where the use of a thing is granted, everything is granted essential to such use. Such a right carries with it an implied authority to do all that is necessary to secure the enjoyment of such easement.

The express or implied grant of an easement is accompanied by certain secondary easements necessary for the enjoyment of the principal one." (Gale & Whatley on Easements, Am. ed., 231.)

So, also, "in the civil law, the right to a servitude drew with it a right to such secondary servitudes as were essential for its enjoyment." (Gale & Whatley on Easements, Am. ed., 231.) Again, it is said that "by the civil law, the owner of the dominant tenement had a right to do whatever was requisite to secure to himself the fullest en-

joyment of his servitude." (Gale & Whatley on Easements, Am. ed., 232.)

"But in entering upon the neighboring soil for the purpose of doing these necessary works, the owner of the dominant tenement was bound not only to exercise ordinary care and skill, but also to repair, as far as he could whatever damage his labors might have caused to the servient tenement." (Gale & Whatley on Easements, Am. ed., 235.)

The stream had become obstructed by the deposits from natural causes of gravel in its bed, so as to prevent the flow of water to plaintiff's ditch.

The defendant, as owners of the servient tenement, was under no obligation to remove these obstructions to the enjoyment by plaintiff of his right to the water.

The duty of making the repairs essential to his employment of the easement devolved upon the plaintiff. (Gale & Whatley on Easements, 215; *Taylor v. Whitehead*, 2 Doug. 745.)

In the exercise of this right, plaintiff, in a reasonable and proper manner, and, as is found by the court, without damage to the defendant, made such an alignment of the stream, and performed such acts, as were essential to his enjoyment of the water. This he had a right to do. (*Prescott v. White*, 21 Pick. 341; S. C., 32 Am. Dec. 266; *Prescott v. Williams*, 5 Met. 429; S. C., 39 Am. Dec. 688.)

The judgment and order should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

THE COURT. — For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 8383. Department Two.—September 2, 1886.]

THOMAS TURNER, RESPONDENT, *v.* PETER DONNELLY, APPELLANT.

PUBLIC LANDS — SETTLERS UPON UNSURVEYED — AGREEMENT FOR CONVEYANCE WHEN VOID.—An agreement between settlers upon unsurveyed public lands of the United States to the effect that, after their respective lands should be surveyed and patents obtained therefor, each would convey to the other such land embraced in the patent to him as was in the possession of the other at the time of the agreement, is void under section 2263 of the United States Revised Statutes, unless the parties are settlers and have their improvements upon the same legal subdivision.

Jd. — CONCLUSIVENESS OF PATENT — FALSE OATH OF APPLICANT TO PRE-EMPT.—A patent for public lands of the United States issued to a pre-emptor cannot be collaterally attacked on account of the false oath of the patentee in making his application to preempt the land.

APPEAL from a judgment of the Superior Court of Santa Clara County.

The facts are stated in the opinion.

Archer & Bowden, Zuck & Hoover, and E. D. Wheeler & Son, for Appellant.

D. M. Delmas, for Respondent.

FOOTE, C.—An action of ejectment for certain lands, in which the plaintiff obtained judgment, from which the defendant appealed. The former had a patent from the United States government to the land sued for, which was the basis of his claim. The defendant in his cross-complaint set out that, prior to the land sued for having been surveyed, pre-empted, or patented, an agreement in writing had been entered into between himself and the plaintiff that when they each should obtain title to the lands which they then occupied and claimed, that if the defendant's patent thus obtained contained any lands which the plaintiff then had in possession that the plaintiff would abide by the lines and actual subdivisions as they then respectively owned and possessed them,

so as to give to the defendant the land thus actually in his possession, and that he, the plaintiff, would execute to the defendant a conveyance to any portion of the land then in the defendant's possession to which he should thereafter obtain title; that the defendant has always been since that agreement in possession of the land sued for, and has remained in possession of it since the date of the patent issued to the plaintiff; that the plaintiff, although a patent has been issued to him of the land, refuses to convey it to the defendant, and prays that the plaintiff be held to be the defendant's trustee as to the land, and directed to convey it to the defendant, etc.

According to the findings of the court, the cause coming here on the judgment roll alone, it appears that,—

“ 1. At the time of the commencement of this action, and ever since the 20th of August, 1878, the plaintiff, Thomas Turner, was and still is the owner of the real estate situate in the county of Santa Clara, state of California, described as follows, to wit: The northeast quarter of the northeast quarter of section thirty-two (32), in township ten (10) south, range five (5) east, Mount Diablo meridian, and the southeast quarter of section twenty-nine (29), in township ten (10) south, of range five (5) east, Mount Diablo meridian, in the district of lands subject to sale at San Francisco, California.

“ 2. Thereafter, on said twentieth day of August, 1878, and before the commencement of this action, said defendant, Peter Donnelly, against plaintiff's will, entered on said premises and ousted the plaintiff therefrom, and from thence hitherto has and still does detain the possession thereof from said plaintiff.

“ 3. On the twenty-eighth day of September, 1871, the plaintiff, Thomas Turner, and the defendant, Peter Donnelly, were severally in possession as *bona fide* settlers and residents thereon of certain unsurveyed lands of the United States, being in the township hereinabove mentioned, the

plaintiff being in possession of a portion of the southeast quarter of section 29, and the said defendant of a large tract of about six hundred acres, including portions of section 29, and a portion of the southeast quarter thereof, and section 30. The house and residence of the plaintiff were on the southeast quarter of section 29, and the house and residence of said defendant were on section 30. The lands so respectively occupied were contiguous to each other, each tract being inclosed by a fence. The fences were built without reference to any government surveys or subdivisions, the lands not having yet been surveyed or subdivided by the government.

" 4. On the day last aforesaid, the plaintiff and defendant, together with other parties, signed and executed a written agreement, which is in the following words:—

" ' CANADA VALLEY, Sept. 28, 1871.

" ' Whereas, we, the undersigned citizens of Canada Valley, have purchased and improved our lands without reference to the government subdivisions; and as our lines and fences do not correspond with the government subdivisions, therefore we and each of us whose names are subscribed to this agreement do severally and individually agree, each with the other, that when the land is surveyed, and we obtain titles for the same from the government or of the railroad company, that we will abide by our lines and subdivisions as we now own and possess them; and will each of us deed to the other the parts of sections or one-quarter sections as we may purchase them of the United States or of the railroad company that is in possession of said party at this time; and hereby binding ourselves to convey all the title we may obtain to lands of the United States or railroad company to each other, so as to give each man the land that he now has in possession according to each and every man's lines and fences now standing.

“ Peter Donnelly, Mary Donnelly, Thos. Kirkham, Peter Turner, Thomas Turner, John Kirkham, E. K. Robinson, James Donnelly, Mathew Raheal, Patrick K. Rogart, David N. Neel, James Raheal, José B. Gutwick.

“ Attest: Wm. Isaac.’

“ 5. In the year 1873, said township was surveyed and subdivided by the United States government.

“ As thus surveyed, the southeast quarter of section 29 lay mostly inside of plaintiff's inclosure; but about forty acres thereof were inside of defendant's inclosure.

“ 6. On the 20th of August, 1878, the United States issued its patent to Thomas Turner in the following words:—

“ ‘The United States of America, to all whom these presents shall come, — greeting:—

“ [Certificate No. 6014.]

“ Whereas, Thomas Turner, of Santa Clara County, California, has deposited in the general land-office of the United States a certificate of the register of the land-office at San Francisco, whereby it appears that full payment has been made by the said Thomas Turner according to the provisions of the act of Congress of the 24th of April, 1820, entitled “An Act making further provision for the sale of the public lands,” and the acts supplemental thereto, for the southeast quarter of section 29 in township 10 south, of range 5 east, Mount Diablo meridian, in the district of lands subject to sale at San Francisco, California, containing 160 acres according to the official plat of the survey of the said lands returned to the general land-office by the surveyor-general, which said tract has been purchased by the said Thomas Turner.

“ Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Thomas Turner, and to his heirs, the

said tract above described, to have and hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Thomas Turner, and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

“ In testimony whereof, I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent, and the seal of the general land-office to be hereunto affixed.

“ Given under my hand, at the city of Washington, the twentieth day of August, in the year of our Lord one thousand eight hundred and seventy-eight, and of the independence of the United States the one hundred and third.

[SEAL]

“ By the President, R. B. HAYES,
“ By Wm. H. CROOK, Secretary.

“ Recorded vol. 10, page 243.

“ S. W. CLARK,

“ Recorder of the General Land-office.

“ And on the twentieth day of September, 1878, it issued its patent to Peter Donnelly in the following words: —

“ The United States of America, to all whom these presents shall come, — greeting: —

“ [Certificate No. 5766.]

“ Whereas, Peter Donnelly, of Santa Clara County, California, has deposited in the general land-office of the United States a certificate of the land-office at San Fran-

cisco, California, whereby it appears that full payment has been made by the said Peter Donnelly, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provisions for the sale of public lands," for the lot numbered 2, and the southeast quarter of the northwest quarter, and the south half of the northeast quarter, of section 30, township 10 south, of range 5 east, Mount Diablo meridian, in the district of lands subject to sale at San Francisco, California, containing 162.55 acres according to the official plat of the survey of the said lands returned to the general land-office by the surveyor-general, which said tract has been purchased by the said Peter Donnelly. Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Peter Donnelly, and to his heirs, the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Peter Donnelly, and his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and also subject to the rights of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

"In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the general land-office to be hereunto affixed.

"Given under my hand, at the city of Washington,

the twentieth day of September, in the year of our Lord one thousand eight hundred and seventy-six, and of the independence of the United States the one hundred and first.

[SEAL]

“ ‘ By the President, U. S. GRANT,

“ ‘ By Wm. H. CROOK, Acting Secretary.

“ ‘ Recorded vol. 9, page 440.

“ ‘ S. W. CLARK,

“ ‘ Recorder of the General Land-office.

“ ‘ Recorded at the request of Jas. C. Zuck, the fourth day of December, 1876, at 55 minutes past 8 o’clock, A. M.

“ ‘ Wm. B. HARDY, Recorder.

“ ‘ By A. S. WILLIAMS, Deputy.’

“ The lands thus patented to plaintiff and defendant respectively are not contiguous to each other, but are at least one half mile apart, and the defendant has no title whatever to any lands in section 29.”

The court below, in addition to the facts already found in said case, filed the following, its additional finding of fact therein: —

“ 6. That said plaintiff suffered no damages by reason of the said entry of defendant and ouster of plaintiff from the premises in controversy; that during the detention of said premises from plaintiff by defendant as aforesaid, the rents, issues, and profits thereof were of no value, nor are they now of any value, whatever.”

Upon this state of facts, since the parties were not settlers upon the same legal subdivision, and did not have their improvements on the same subdivision, in the sense as contemplated by section 2274 of the United States Revised Statutes, and the lands patented to each and referred to in the within contract were not contiguous, but at least half a mile apart, and in two different sections, we are of opinion that the agreement under which the defendant claims an equitable title to the plaintiff’s land was void under section 2263 of the United States Revised Statutes, and the rulings of this court in *Damrell v. Meyer*, 40 Cal. 166, 170,

and *Hudson v. Johnson*, 45 Cal. 21, 25, and authorities there cited.

And the patent, once issued to the plaintiff, remained good as to all the world until canceled for fraud in an action brought by the United States government. Even granting that he, in making his application to pre-empt the land, had made a false oath, the defendant could not take advantage of this collateral matter to enforce his void agreement with the plaintiff. And the validity of the patent to the plaintiff on account of his alleged false oath could not be successfully assailed in such a collateral proceeding as the one resorted to by the defendant here. (*Moore v. Wilkinson*, 18 Cal. 478, 488; *Yount v. Howell*, 14 Cal. 465-470.)

We are therefore of opinion that no prejudicial error is shown by the record to have been committed by the trial court, and that the judgment should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 9065. Department Two.—September 3, 1886.]

IN THE MATTER OF THE ESTATE OF MICHAEL CAHALAN, DECEASED.

ESTATE OF DECEDENT — ORDER SETTLING ACCOUNT AND DISCHARGING EXECUTOR — SETTING ASIDE.—After the expiration of the time limited by section 473 of the Code of Civil Procedure, a decree settling the final account of an executor and discharging him from his trust, if regular upon its face, cannot be set aside by the Probate Court on the ground that it had been inadvertently and prematurely entered. The remedy in such a case is in equity.

D.—REVIEW OF ORDER SETTING ASIDE.—An order setting aside a decree settling the final account of an executor, although not directly appealable, may be reviewed on an appeal by the executor from a subsequent decree settling his final account.

APPEAL from an order of the Superior Court of Santa Clara County settling the final account of an executor, and distributing the estate of a deceased person.

The final account of the executor of the last will of the deceased was settled and the executor discharged by a decree of the Probate Court entered on the 7th of August, 1875. On the 30th of April, 1880, the respondents, who were children of a deceased sister of the testator, whose names had been omitted from the will, filed a petition seeking to have the decree of the 7th of August, 1875, set aside on the ground that it had been inadvertently and prematurely entered before any order for the distribution of the estate had been made or distribution had. On the 11th of June, 1880, an order was made setting aside the decree of the 7th of August, 1875, from which the executor appealed. The appeal was dismissed on the ground that the order was not appealable. On the 16th of December, 1882, in pursuance of an order of the lower court, the executor filed a final account, which was settled, and distribution of the estate ordered by a decree entered on the 23d of February, 1883. From this decree the executor appealed. The further facts are stated in the opinion.

John Reynolds, for Appellant.

William P. Veuve, and J. J. Burt, for Respondents.

FOOTE, C.—An appeal from an order of the Superior Court of Santa Clara County settling a final account of an executor and distributing the decedent's estate.

Michael Cahalan, the deceased, departed this life on the sixteenth day of December, A. D. 1874, leaving a will dated February 13, 1872, in which the petitioners (respondents), the children of a deceased daughter of the testator, were not mentioned, and by which M. M. Cahalan (the appellant) was constituted executor and residuary legatee.

The will was duly admitted to probate, and letters testamentary issued to the appellant on the ninth day of January, A. D. 1875.

Notice to creditors to exhibit their claims was given February 7, 1875.

A final account was rendered and filed by M. M. Cahalan on the 26th of June, 1875. Accompanying that account was a petition setting forth that all debts had been paid, and all other directions of his testator's will had been faithfully carried out, and asking that a day be appointed for the settlement of his account, and for his discharge. It is recited in the decree ordering the allowance of that account and the discharge of the executor, which order was made on the seventh day of August, 1875, that it had been proven to the satisfaction of the court (then the Probate Court) that due and legal notice had been given of the settlement of said final account; that the executor had paid all the expenses and just claims against the estate of his testator, and all legacies and bequests in said will mentioned; that he had fully and completely discharged the trust mentioned in the eighth subdivision of the will, paid over all the money and delivered all the property as provided in said will; that it fully appeared to the court by documentary evidence and other good and sufficient proof that said executor had fully and completely done, performed, and carried out the provisions of said last will of said deceased; that he had fully complied with all the orders of the court in the premises; that he had honestly and faithfully discharged all of his duties as such executor; that no other property remained in his hands belonging to the estate; that no further acts remained to be performed by him as executor of said decedent; that he be wholly and absolutely discharged from all further duties and responsibilities as such executor, his letters testamentary were declared vacated, the estate adjudged fully distributed, and the trust settled and closed.

Upon its face, that decree was valid. (*Dean v. Superior Court*, 63 Cal. 473.) And as the statutory period for obtaining relief against it as prescribed in section 473 of the Code of Civil Procedure had long since elapsed, it could only be attacked and set aside on the ground alleged in the petition therefor by a proceeding in equity. (*Estate of Hudson*, 63 Cal. 454; *Dean v. Superior Court*, *supra*.)

But it is said this court cannot upon the present appeal review the order made on the 11th of June, 1880, setting that decree aside.

The order thus made was declared by this court to be one from which an appeal cannot be prosecuted. (*Estate of Calahan*, 60 Cal. 232.)

It was clearly intermediate, and necessarily affects the judgment from which this appeal is prosecuted, and is reviewable on such appeal. (Code Civ. Proc., sec. 956.)

For if the decree which the order set aside was valid on its face, and could not be, as it was, summarily held for naught, then that now appealed from was affected to the extent that it was utterly void, and no basis existed for the action of the court in making it unless it had first swept away the former decree, and thereby made a starting-point for its jurisdiction and procedure in the premises.

As a result, it follows that the order appealed from was erroneous, and should be reversed, and the cause remanded to be proceeded with in accordance to the views herein expressed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion, the order is reversed, and cause remanded to be proceeded with in accordance with the views expressed in said opinion.

[No. 8439. Department Two.—September 3, 1886.]

MURDOCH NICHOLSON, RESPONDENT, *v.* WINIFRED C. TARPEY ET AL., APPELLANTS.

SPECIFIC PERFORMANCE — CONTRACT FOR SALE OF LAND — INADEQUACY OF CONSIDERATION — WAIVER.—A vendor, under a contract for the sale of land, by accepting the purchase-price agreed to be paid therefor, and delivering a deed in which a portion of the land was fraudulently omitted, though supposed by the vendee to include the whole, waives his right to object to a specific performance of the contract on the ground of the inadequacy of the consideration.

ID. — SECONDARY EVIDENCE OF CONTRACT — DEPOSITION — POSSESSION OF CONTRACT BY ADVERSE PARTY.—The action was brought by a vendee for the specific performance of a written contract for the sale of land. Prior to the trial, the deposition of a witness was taken, who testified, without objection, to the terms of the contract. At the trial, the defendants objected for the first time to the evidence contained in the deposition, on the ground that secondary evidence of the contract could not be given without proof of the loss or destruction of the original. The plaintiff thereupon showed that the contract was executed in duplicate, one copy of which had been delivered to him, and the other retained by the vendor, the ancestor of the defendants, and that his copy had been subsequently delivered to the vendor, and destroyed by him. The copy retained by the vendor was not accounted for, nor did it appear that any notice to produce it in court had been given. One of the defendants had the copy in his possession, and could have produced it. *Held*, that the defendants could not object to the evidence.

ID. — DECLARATIONS OF VENDEE TO ASSESSOR — EVIDENCE OF WHEN INADMISSIBLE — ADVERSE POSSESSION.—In such an action, declarations made by the plaintiff to the assessor, at the time the land in question was assessed, and in the absence of the defendants, to the effect that he was the owner of the land, are not admissible in support of his claim to the adverse possession thereof, or to show that the assessment was made to him.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order refusing a new trial.

The action was brought for the specific performance of a contract for the sale of land against the devisees and heirs at law of the vendor. The further facts are stated in the opinion of the court.

D. M. Delmas, and William Matthews, for Appellants.

Julius Lee, and King, Rodgers & Lindley, for Respondent.

The COURT.—The demurrer to the complaint in this cause was properly overruled.

In actions for the specific performance of contracts for the sale of lands, it is necessary to allege and show to the court an adequate consideration for the performance of the contract sought to be enforced, and that the same is fair and reasonable in all its parts, and of such a character as may fairly call for the interposition of a court of equity. (*Agard v. Valencia*, 39 Cal. 292; *Bruck v. Tucker*, 42 Cal. 346; Fry on Specific Performance, sec. 251.)

In this cause, however, the complaint shows that Mr. Tarpey, with whom the contract for conveyance was made, accepted the consideration of fifteen hundred dollars in such contract specified to be paid, and executed a deed of conveyance, which plaintiff herein supposed conveyed the land in question, but which, in fact, by the fraud of said Tarpey, failed to include a portion of the land agreed to be conveyed.

By accepting the purchase price and delivering of a deed, Tarpey waived all claim to inadequacy of consideration, and that question is not involved in the case.

The *gravamen* of the charge against Tarpey is, that he professed to convey the whole premises, and by his fraudulent representations induced the plaintiff herein to believe that he had so conveyed, when in truth he had granted but a portion thereof; and the object of this action is to so reform the deed as to make it conform to the agreement pursuant to which it was executed.

2. There was no error in the ruling of the court admitting the deposition of George C. White.

According to the record, the witness White, whose deposition had been taken previous to the trial, testified, with-

out objection, to the contents of the written agreement between Tarpey and plaintiff for the conveyance of the land in question. At the trial, defendants for the first time objected to the evidence contained in this deposition, upon the ground that secondary evidence of its contents could not be introduced without proof of the loss or destruction of the original, etc. Thereupon it was shown by the testimony of plaintiff that the contract was executed in duplicate, one copy of which was delivered to plaintiff, and the other retained by Tarpey. That at the date of the execution to the plaintiff of the deed, his copy of the agreement was delivered to Tarpey, who destroyed it. The copy retained by Tarpey was not accounted for, nor did it appear that any notice had been given for its production in court. Defendants had a right to have the original contract introduced in evidence, if in existence and capable of being produced.

The defendant Tarpey had the copy in his possession, and could have produced it, thus obviating the necessity for introducing secondary evidence. Not having produced it, his objection should not be listened to.

3. At the trial, plaintiff, as a witness in his own behalf, testified that after he moved to the land bought of Tarpey in 1871, he himself gave in the said lands to the assessor of Monterey County for taxation, and was then asked by plaintiff's counsel the following question: "When you gave it in, what did you say to the assessor?" In response to which the witness replied: "I told him I had four hundred acres there; that the land was unsurveyed, and that the deed called for six hundred acres, giving the bounds of the deed," etc. To the introduction of which evidence counsel for defendants objected in due form, and the ruling of the court admitting such evidence is assigned as error.

The statements of a party in interest in his own behalf, made in the absence of the opposite party, and constituting no part of the *res gestæ*, are not in general ad-

missible as evidence, and we perceive no theory upon which the evidence introduced was admissible.

It consisted merely in the oral declarations of the party in his own behalf, and as such cannot be upheld. If it be urged that it was introduced for the purpose of showing that the property was assessed to plaintiff and the taxes thereon paid by him, the answer is twofold: 1. Prior to April 1, 1878, the payment of taxes upon land was not a fact essential to adverse possession; 2. The assessment of property and payment of taxes thereon are facts which, when essential to a case, are to be proven as such; and the declarations of a party made to the assessor at the time he assesses property do not prove or tend to prove the fact of assessment, or any other fact competent to be shown.

Conceding it to have been proper for plaintiff to prove as a fact that this property was assessed to him for the purposes of taxation, it does not follow that his declarations of ownership or possession, made in his own behalf, and which in no wise tended to show that an assessment was in fact made, can be received.

Schenck v. Lithaff, 75 Ind. 485, and *Whitney v. Houghton*, 125 Mass. 451, are in point, and we think conclusive of the question.

The testimony thus erroneously admitted was important to the issue of plaintiff's adverse possession made in the case, and as we cannot see that it failed to influence the decision of the cause, the judgment and order appealed from are reversed, and a new trial ordered.

Hearing in Bank denied.

[No. 11241. Department One.—September 9, 1886.]

W. G. DAVISON, RESPONDENT, *v.* THE BOARD OF SUPERVISORS OF SOLANO COUNTY, APPELLANT.

ROAD OVERSEER — DUTY OF SUPERVISORS TO APPOINT — APPOINTMENT CANNOT BE COMPELLED BY MANDAMUS.—The provision of section 2642 of the Political Code, as amended in 1883, requiring the board of supervisors of each county, upon the petition of a majority of the tax-payers of a road district, to appoint a road overseer therefor, is merely directory, and a writ of mandate will not lie to compel the board to appoint a particular person to such office.

APPEAL from a judgment of the Superior Court of Solano County.

The proceeding was by *mandamus* to compel the defendant to appoint the petitioner to the office of road overseer of Suisun road district in Solano County. The petitioner, claiming to act under section 2642 of the Political Code, as amended on the 28th of February, 1883, presented a petition signed by a majority of the tax-payers of the road district, asking the appointment of the petitioner as road overseer. The board of supervisors refused to make the appointment, whereupon this proceeding was commenced on the 7th of January, 1885. Judgment was rendered in favor of the petitioner, ordering a peremptory writ of mandate to issue as prayed for. The further facts are stated in the opinion of the court.

O. P. Dobbins, Jasper Robberson, and J. M. Gregory, for Appellant.

Joseph McKenna, for Respondent.

Ross, J. — Section 2642 of the Political Code, as amended in 1883 (Stats. 1883, p. 8), provided: —

“ The board of supervisors of each county shall, upon the presentation of a petition signed by a majority of the tax-payers of said road district, appoint one road overseer or road master for each or any road district in their re-

spective counties, such overseer to be an elector of the district for which he is appointed, who shall hold office for and during the pleasure of the board, not to exceed two years, and who shall, under the direction of the road commissioner of his district, perform the duties hereinafter in this chapter specified. And if a vacancy at any time occurs in any district, the supervisors may appoint without any petition for the unexpired term. If the board does not appoint road overseers, the road commissioners within their respective districts shall perform the duties imposed on road overseers by the provisions of this chapter; *provided*, that all road overseers, road masters, or road commissioners now in office by election must hold office and exercise the duties thereof for the terms for which they were elected."

Under that provision of law, the petitioner in the present case presented to the board of supervisors of Solano County a petition signed by a majority of the tax-payers of Suisun road district of that county, asking the appointment of the petitioner road overseer of the district. The board having refused to make the appointment, the Superior Court, upon the application of petitioner, awarded a writ of mandate to compel the appointment. Manifestly, the judgment is erroneous. Under no possible view of the statute was the board of supervisors obliged to appoint the *person* petitioned for road overseer. Nor under a true reading of the statute was the board obliged to appoint any one, although requested to do so by a majority of the tax-payers of the district.

That the statute, which has since been changed (Stats. 1885, p. 94), was directory, is shown by the provision: "If the board does not appoint road overseers, the road commissioners within their respective districts shall perform the duties imposed on road overseers by the provisions of this chapter."

Judgment reversed.

McKINSTRY, J., and MYRICK, J., concurred.

[No. 11352. Department One.—September 9, 1886.]

W. A. PALMER, RESPONDENT, *v.* UNCAS MINING COMPANY ET AL. HARVEY WILCOX, APPELLANT.
VICTOR HOLM, RESPONDENT, *v.* UNCAS MINING COMPANY ET AL. HARVEY WILCOX, APPELLANT.

MINER'S LIEN — FORECLOSURE OF — ALLEGATION OF NON-PAYMENT — DEMURRER. — In an action to foreclose a miner's lien, an allegation that the defendant, for whom the plaintiff performed the services for which the lien was filed, has paid to the plaintiff no part of the amount due therefor, and that the same is now due and owing to the plaintiff from the defendant, is a sufficient averment of non-payment, in the absence of a demurrer.

ID. — RIGHT TO LIEN — WHEN NOT LOST BY GIVING ORDER OF MINE-OWNER. — A miner does not lose his right to a lien by giving an order on the owner of the mine for a portion of the amount due him for his labor thereon, if the order was not received by the payee in payment of any claim against the drawer, nor paid or accepted by the drawee, but returned to the drawer before the filing of his claim of lien.

ID. — SUPERINTENDENT OF MINE — RIGHT OF TO LIEN. — One performing manual labor in and upon a mine is entitled to a lien therefor, though called the superintendent of the mine.

DEPOSITION — STIPULATION FOR — WITNESS OUT OF STATE — ESTOPPEL. — Where the parties stipulate that the deposition of a witness out of the state may be taken by a designated person, and when taken may be used on the trial, they are afterwards estopped from objecting that the deposition was not taken under a commission issued by the trial court.

APEAL from a judgment of the Superior Court of Sierra County, and from an order refusing a new trial.

The actions were brought for the foreclosure of certain miner's liens. Prior to the trial of the actions, the counsel of the respective parties stipulated that the depositions of certain witnesses residing out of the state might be taken before a designated justice of the peace, and that when so taken the depositions might be used on the trial of the actions. On the trial, the appellant objected to the introduction of the depositions in evidence, on the ground that they were not taken under a commission issued from the trial court. The further facts are stated in the opinion.

Henry Miller, and Van Cleef & Wehe, for Appellant.

M. Farley, and S. A. Smith, for Respondent Holm.

S. B. Davidson, for Respondent Palmer.

Ross, J.—Palmer and Holm commenced separate actions against the Uncas Mining Company and others for the foreclosure of miners' liens, which actions were subsequently consolidated and tried together. So far as Holm's suit is concerned, it is objected,—1. That his complaint is fatally defective in that it does not contain a sufficient allegation of non-payment; 2. That the labor performed by Holm was not such as would entitle him to a lien; and 3. That "before filing his lien, Holm transferred nearly all his claim to Beaver and Junot, but afterward had it reconveyed, and filed a lien" for the amount claimed to be due him.

In respect to the complaint, the allegation is, that the defendant, the Uncas Mining Company, for which company it is averred the plaintiff rendered the services, "has paid to plaintiff no part of said \$171, and the same is now due and owing to the plaintiff from said defendant." No demurrer was interposed, in the absence of which it cannot be held the allegation is insufficient.

The case shows that the labor for which the lien in question is claimed was rendered in and upon the mining claim.

The fact that Holm gave to Beaver and Junot orders on the mining company for portions of the amount due him did not divest his right to the lien claimed. The orders were not received by Beaver or Junot in payment of their respective claims against Holm, nor were they paid or accepted by the mining company, but were returned to Holm before the filing of his claim of lien.

In respect to the suit of Palmer, it is said that his assignor, Schmidt, was not entitled to a lien because he was a "mining superintendent." Whether a mining superintend-

ent is under the statute entitled to a lien or not, the case shows that although Schmidt was called superintendent, the service for which his claim of lien was filed was manual labor done by him in and upon the property upon which the lien is sought to be established.

The stipulation of counsel under which the depositions of Schmidt and Palmer were taken estop appellant from claiming that they were not taken under a commission issued from the court.

Judgment and order affirmed.

MCKINSTRY, J. and MYRICK, J., concurred.

[No. 9512. Department One.—September 9, 1886.]

TABLE MOUNTAIN AND SAN ANDREAS WATER COMPANY, APPELLANT, *v.* A. A. CHAVANNE, RESPONDENT.

AGREEMENT FOR SALE OF WATER CONSTRUED. — An agreement, stated in the opinion, whereby the plaintiff was to furnish and the defendant to take, at a specified price, certain water, to be used in running a quartz-mill belonging to the latter, held, not to require the defendant to pay the stipulated price after he had parted with his ownership of the mill.

APPEAL from a judgment of the Superior Court of Calaveras County.

The facts are stated in the opinion of the court.

Reddick & Solinsky, and J. H. Budd, for Appellant.

Robinson, Olney & Byrne, for Respondent.

Ross, J. — On the thirteenth day of October, 1879, the plaintiff, being engaged in the business of selling water for mining and other useful purposes, and the defendant, being the owner of a certain mine and quartz-mill, entered into an agreement in writing, by which the plain-

tiff agreed and bound itself to furnish the defendant certain water, which the defendant agreed and bound himself to take and use in running the mill. Among other provisions, the agreement contained the following:—

“It is further understood that the said party of the second part [defendant] may make any alteration in the driving power of his mill, and may put up amalgamators, concentrators, or arastras and machinery at and near his mill without any further or extra charge for the water, but shall not put up another mill and use the same water again for a separate driving power.

“And the said A. Chavanne, the party hereto of the second part, agrees to pay to said party of the first part the sum of one hundred dollars per month for the use of said water, payable quarterly.

“It is further understood that should said party of the second part erect another mill and use the same water to run said other mill, he shall pay to said party of the first part fifty dollars (\$50) per month additional, but no extra charge for water shall be made for putting up more stamps in the present mill. This agreement is to continue and be in force between the parties and their successors, administrators, representatives, and assigns for the term of ten years from this date, for which term the same shall be binding upon the parties to this agreement and their successors in interest as aforesaid.

“It is further understood that if the party of the second part should sell his mines, his successors in interest in the mines shall be bound by this agreement.”

A subsequent addition was made to the agreement, which does not affect the question to be decided.

The parties to the contract at once entered upon its performance, and each duly complied with its requirements until the defendant, on the 14th of May, 1880, sold and conveyed his mill and mining property mentioned in the agreement to a corporation called the Amelia Gold Mining

Company, from and after which time, and until the first day of October, 1881, the plaintiff furnished the water mentioned in the agreement for the use of and which was used by the Amelia Gold Mining Company in the operation of the mill and mine aforesaid. The findings show that from the time of the defendant's sale to the date last mentioned defendant was the agent of the Amelia Gold Mining Company, and that "by and in accordance with his instructions, the plaintiff made out the bills for water furnished as aforesaid against the said Amelia Gold Mining Company, and receipts were given therefor in the name of the plaintiff to the Amelia Gold Mining Company, defendant Chavanne paying the same by his check drawn upon the Swiss Bank in San Francisco. That on the first day of October, 1881, the said defendant Chavanne ceased to have any interest or connection with the Amelia Gold Mining Company, or with the mines, mill, and premises in said agreement mentioned, and on said date notified J. F. Treat, the president of the plaintiff corporation, that he had sold all of his interest in said property to the Amelia Gold Mining Company."

The plaintiff subsequently continued to furnish the water for the use of the mill, and seeks by this action to charge the defendant Chavanne with the amount per month stipulated in the agreement of October 13, 1879. The whole question therefore turns on the true construction of that contract; the plaintiff insisting that defendant thereby made himself personally responsible at the price fixed for the water plaintiff agreed to furnish during the whole period of ten years. We do not think that the true meaning of the agreement. The price to be paid was for the use of the water; and as the latter was to be used in running the mill, and as the right of the defendant to sell the mill as well as the mine was expressly recognized in the agreement, it would seem to follow necessarily that it was not contemplated that de-

fendant should pay the price after he should sell the mill. That conclusion is greatly strengthened by the provision of the agreement attempting to bind the successors in interest of defendant to take and use the water in running the mill, and to pay for its use at the price mentioned in the agreement during the term therein specified. It is further strengthened by the construction the parties themselves put upon the agreement by the furnishing by plaintiff of the water to the Amelia Gold Mining Company, and the receipt from the latter of pay for its use in accordance with the terms of the agreement. Whether or not the agreement is binding upon the Amelia company is a question that does not arise in this case.

Judgment affirmed.

McKINSTRY, J., and MYRICK, J., concurred.

[No. 8352. Department Two.—September 13, 1886.]

CATHERINE SENTER, RESPONDENT, *v.* WILLIAM A.
SENTER ET AL., APPELLANTS.

FALSE REPRESENTATION — DECREE IN DIVORCE SUIT — REFORMATION OF — KNOWLEDGE OF ATTORNEY.—Pending an action for divorce, the parties thereto entered into an agreement for the division of their community property in case a divorce should be granted, whereby the wife, the present plaintiff, was to have set apart to her a certain ranch known as the Home Place, consisting of a particular lot, and a tract of land of about twenty acres inclosed therewith. The decree in the divorce suit, to which the plaintiff assented, awarded her the Home Place, but erroneously described it as consisting solely of the lot, thus omitting the twenty-acre tract. At the time of the decree, neither the plaintiff nor her attorney knew of the exact extent and boundaries of the Home Place. The attorney had means by which he might have informed himself on the subject, but omitted to do so, and applied to the defendant for information, who stated to him that the lot covered the entire place. The action was brought to reform the decree so as to include and award to the plaintiff the twenty-acre tract, on the ground that her assent to the decree as rendered had been induced by the false and fraudulent representations of the

defendant. *Held*, that the plaintiff was entitled to the relief prayed for.

PRACTICE — IMMATERIAL ISSUE — DEFENSE UNSUPPORTED BY EVIDENCE — FINDINGS. — An issue raised by a defense upon which no evidence is offered at the trial, and no finding made, is deemed immaterial, and the judgment will not be reversed for want of a finding.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order refusing a new trial.

The facts are stated in the opinion.

S. F. Leib, and *J. R. Lowe*, for Appellants.

J. Alexander Yoell, for Respondent.

SEARLS, C. — The plaintiff herein, Catherine Senter, and William A. Senter were husband and wife. The former brought an action for divorce, and for a division of the community property. Pending the action, the parties agreed upon the manner in which the community property should be divided, by the terms of which, as plaintiff claims, she was to have a ranch upon which the parties had formerly resided, known as the Home Place.

The Home Place consisted of lot 4 of the Santa Teresa rancho, and also of a tract of land of about twenty acres inclosed therewith, and forming a part of said Home Place.

The decree of the court, which awarded this property to plaintiff, and to which she assented, described the Home Place as lot 4, etc., thus omitting therefrom the twenty-acre parcel thereof.

The contention of plaintiff is, that she was induced by the false and fraudulent representations of defendant to suppose, and did suppose, that lot 4 included the whole of the Home Place, and that her assent to the division of the property as provided in the decree was based on such belief.

This action is brought to amend and reform the decree

so as to include and award to plaintiff the twenty acres of land, and to set aside as fraudulent a conveyance thereof by defendant to one Sophia L. Morey, who is also made a party defendant.

The cause was tried by the court without a jury, written findings filed, and judgment rendered thereon in favor of plaintiff as prayed for in her complaint.

The appeal is from the judgment, and from an order denying a new trial.

It is contended by appellant that the facts as found by the court show that in the divorce case counsel for plaintiff was possessed, and had at hand or within reach, the means of information by which to determine accurately the extent and boundaries of the Home Place, so called, and that the plaintiff cannot therefore recover.

The answer to this position is, that, conceding plaintiff to be bound by the knowledge of her attorney, it appears that *in fact* the attorney believed lot 4 to include the whole of the Home Place; and while he might have learned of his mistake by reference to maps and information in his own office and in the records of the county, that he applied to the defendant for information on the subject, and the latter, seeing and knowing that plaintiff's attorney was mistaken, knowingly and fraudulently misled him by falsely stating that lot 4 did cover the whole of the Home Place.

Had defendant remained silent when asked by the attorney if lot 4 included the whole of the Home Place, it may well be doubted if he could be held, as it would then have been the duty of the attorney of plaintiff to use the information at hand, or means within his reach, for obtaining correct information; but when he suppressed inquiry and misled plaintiff's attorney by a false statement as to a material fact, which the latter believed and acted upon, the case is somewhat different.

Whatever the means of knowledge of the attorney may have been, it is patent that he was not correctly informed;

and as to facts not within his knowledge, he had a right to rely upon the information of the defendant, and the latter cannot escape responsibility by showing that plaintiff's attorney might have ascertained that such representations were untrue. (*Bank of Woodland v. Hiatt*, 58 Cal. 234; *Smith v. Richards*, 13 Pet. 36; *Bench v. Sheldon*, 14 Barb. 67; *Mead v. Bunn*, 32 N. Y. 275; 2 Kent's Com. 484; *Perry on Trusts*, secs. 179, 180.)

This view does not conflict with the doctrine that the seller is at liberty to avail himself of his superior knowledge in dealing with the purchaser without rendering himself liable. To gainsay that doctrine would tend to retard trade, and to place the man of superior knowledge, judgment, skill, and acumen on the same plane with the most ignorant and negligent, and by depriving the former of the fruits of his energy and skill, would so hamper legitimate trade as to make it scarcely worth pursuing.

It maintains that doctrine, but at the same time holds that the seller must not resort to artifice, fraud, or falsehood in misleading the buyer as to facts of which the latter is ignorant, and which are material for him to know.

If A is the owner of a ship absent on a perilous voyage, long overdue at her destined port, under circumstances raising a presumption that she may be lost by perils of the sea, and B. who has learned that such ship has sought safety in another and distant port, which fact is unknown to A, purchases the vessel from A at a reduced price, he has availed himself of his superior knowledge, has practiced no deception, and is not liable; but in the same case, suppose B had represented to A that the vessel was wrecked, the latter believing the statement to be true, and the former knowing it to be false, and that he had then purchased her for a trifle, can it be doubted that he would be liable to A? We think not. He was not bound to speak, and might have

maintained silence, but when he elected to speak, he was bound to utter the truth, and having failed to do so, to the damage of A, he is liable.

The case of *Board of Commissioners v. Younger*, 29 Cal. 172, cited by appellant, was one in which the defendant had made no representations of any kind to the plaintiff, except that in a petition for the purchase of the land, and in a deed prepared by his agent and presented for execution, the land was described by courses and distances and by metes and bounds, and concluding with these words, "containing about seventy-two acres of land," and the court held: 1. That with the means at hand furnished by the courses and distances and metes and bounds of the deed, and by the opportunities which the plaintiff had in common with the defendant for ascertaining the quantity of the land, and in view of the fact that quantity is as a rule mere matter of description, which must give way to courses and distances, which in turn must yield to metes and bounds, there was no such misrepresentation of a material fact as entitled plaintiff to recover; and 2. That a failure by defendant to state that another was in possession of a portion of the premises conveyed, with knowledge that plaintiff had adopted a rule not to sell occupied land except to the occupant, was not such a fraudulent suppression of a material fact as entitled plaintiff to recover.

Hawkins v. Hawkins, 50 Cal. 558, was a case in which the plaintiff signed a written contract without reading it, and this court held, in affirming the judgment of the court below sustaining a demurrer to the complaint, that where no relation of confidence or trust existed between the parties to the contract, and where the means of knowledge were equally open and accessible to both, it was the duty of plaintiff to have read the contract, or to have it read to him, before signing, and having failed to do so, he could not recover.

The substance of a long line of authorities upon what

we may, for convenience' sake, term this side of the case is to be found at page 484 of volume 2 of Kent's Commentaries, where he says: "The common law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or of careless indifference to the ordinary and accessible means of information."

This doctrine is entirely compatible with that class of cases in which a party is held liable for having by false and fraudulent representations as to material facts prevented the opposite party from seeking the information which he did not possess, and which but for such representations he might have obtained.

Such seems to have been the effect of defendant's representations in this instance, and we are of opinion the court below did not in this respect err in its conclusion as to defendant's liability upon the facts.

The testimony in support of the findings was ample, and we see no error for which the cause should be reversed, unless it be found in a failure of the court to find upon one of the material issues presented by the pleadings.

The facts necessary to a comprehension of the question involved are as follows:—

Plaintiff in her complaint avers that prior to the entry of the decree in the divorce case, she and the defendant Senter agreed to compromise all property questions and the division thereof in said action for divorce, and to withdraw the same from the consideration of the court, *in case a divorce should be granted*, and then proceeds to show how under such agreement the property was to be divided. The answer in response to such allegations is as follows:—

"Defendants deny that said defendant Senter and plaintiff ever made any agreement whatever which was in terms dependent upon a judgment or decree divorcing

them being obtained; but on the contrary, defendants allege that while the action for divorce mentioned in said complaint was pending, said defendant Senter and plaintiff agreed that a judgment divorcing them should be obtained in said action, and that said defendant Senter should and would make no contest or opposition to such action, or to the plaintiff obtaining a decree of divorce in such action, and such agreement was made a part of and was the consideration of each and every agreement or compromise ever entered into between said defendant Senter and plaintiff concerning or relating to the division or segregation of their community property."

The court finds:—

"That while said action was pending, and before any appearance therein by said William A., to wit, on or about the — day of January, 1881, said William A. proposed to the plaintiff, Catherine, through her attorney, J. A. Yoell, to divide their said common property between them, and to withdraw from the consideration of the court in said action for a divorce all questions relating to or affecting the division of said common property.

"That pursuant to said proposition, it was then and there agreed between said William A. and said Catherine, that the personal property should be and was divided in a certain manner, and that said real estate known and called the Home Place should be allotted to and taken by the plaintiff, Catherine, as and for her separate estate."

The finding further proceeds to show what property defendant was, under the agreement, to have, and that the agreement was carried out by the decree; and this is the only finding responsive to the issue there made.

In *Beard v. Beard*, 65 Cal. 354, the plaintiff had transferred certain property to the defendant, his wife, in consideration of her executing to him four notes, and securing the same by a mortgage, "and abandoning her de-

fense in an action for divorce then pending between them, and doing nothing to resist or prevent or delay him in obtaining a decree of divorce therein"; and this court held that the agreement of the wife with respect to the divorce proceeding was a fraud upon the court, and as it constituted an essential and inseparable part of the consideration, the entire transaction became tainted by fraud, and no action would lie to enforce the payment of the notes.

From the doctrine of *Beard v. Beard, supra*, and many other cases which might be cited of the same tenor and to the same effect, we think the issue made by the answer was essential to the disposition of the cause, and should have been passed upon by the court.

We understand counsel for the respondent to, tacitly at least, concede this proposition; but his position is, that the finding by the court of a specific contract in fact negatives the existence of any other or different contract.

It is true that the substance only of the issue need be found, and that in many instances the finding that an alleged contract contained certain terms and conditions, and showing directly or by fair intendment that the whole contract is given, the presumption will not only be indulged that it contained no other terms and conditions, but also, in the absence of a showing to the contrary, that no other and different contract existed.

The averments of the complaint and answer do not differ materially as to the manner in which the property of the spouses was under their agreement to be divided. Indeed, except as to the alleged fraud of the defendant in the description of the Home Place, whereby twenty acres of the land, parcel thereof, was omitted, there is no question made.

The real defense is founded upon the *consideration* of the agreement. Defendant alleges that a part of the consideration was, that a judgment divorcing them should be obtained in the action then pending and undetermined.

and that he, (the defendant) should and would make no contest or opposition to such action, or to the plaintiff obtaining her decree of divorce.

Under these circumstances, the vital question is not, What was the contract? but, What was the consideration upon which it was founded?

Suppose A and B enter into a contract for an immoral purpose, or to perform an act in contravention of public policy, or to defraud a third party,—in all these cases the contract may be admitted or proven, and yet the law cannot pronounce upon its validity until the purpose or the fraudulent intent is determined. The intent will sometimes appear from the contract itself; when it does, it is sufficient; but more frequently such is not the case, and then it is necessary to go beyond its mere terms in determining its validity.

A brings suit against B, and avers that the latter agreed in writing to pay him five hundred dollars.

B answers and sets up that the only consideration for the agreement was a promise on the part of A that he would assassinate C.

The parties admit, or what is the same thing, the proofs show, that the contract was made, and the court is asked to pronounce judgment; manifestly it could not do so without first passing upon the fact of the consideration. That issue has become the chief factor in the problem.

In such a case, the fact that a contract was entered into, standing as a special verdict, would not warrant a judgment; and under our system of requiring written findings by the court (unless waived) in causes tried without a jury, it is considered that the findings of fact should cover all the issues, and be so far-reaching that if turned into a special verdict they would support a judgment.

The system of implied findings which prevailed under the act of 1861 has no place under the Code of Civil Procedure.

To this rule there is the exception that when a defense is tendered by a party, upon which no evidence is offered at the trial, and upon which there is no finding, the issue will be deemed immaterial, and the cause will not be reversed for want of such finding. This exception is based upon the idea that a cause will not be reversed for want of a finding which, had it been made, must have been adverse to appellant.

We have scanned the record carefully, and find no testimony whatever in support of the defense indicated.

We are therefore of opinion the judgment and order appealed from should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

[No. 11628. Department Two.—September 14, 1886.]

C. F. CARLSON, PETITIONER, *v.* SUPERIOR COURT OF ALAMEDA COUNTY, RESPONDENT.

JUSTICE'S COURT — APPEAL ON QUESTIONS OF LAW — ARBITRARY DISMISSAL OF — JURISDICTION — CERTIORARI.—An appeal from the Justice's Court taken on questions of law alone cannot be dismissed by the Superior Court on the ground that the appeal should have been taken on questions of law and fact, if the statement on appeal contains the evidence upon which the question of law involved in the appeal was raised and decided in the Justice's Court. Such a dismissal is in excess of the jurisdiction of the Superior Court, and will be annulled on *certiorari*.

APPLICATION for a writ of review. The facts are stated in the opinion of the court.

Wall & Collins, for Petitioner.

MCKEE.—The writ of review in this case was granted to determine whether the Superior Court of Ala-

meda County pursued its jurisdiction in a case before it on appeal from the judgment of a Justice's Court.

The case appealed was an action of claim and delivery brought by E. F. Herbert against C. F. Carlson, a constable, for the return of a buzz-planer, which the constable had seized on the 23d of February, 1886, as the property of A. M. Stoddard, to satisfy an attachment issued against Stoddard in favor of one Higgins.

In the action, the plaintiff recovered judgment for the return of the buzz-planer, or its value if a return could not be had, and costs.

From the judgment, Carlson appealed to the Superior Court on a question of law. The question was, whether the transfer, by which the plaintiff claimed title to the attached property, was void against the attaching creditor upon the ground that it was not accompanied by an immediate delivery and followed by an actual change of possession of the buzz-planer. It was contended that the transfer was void upon that ground, and that the judgment appealed from was erroneous and reversible.

The Superior Court, however, held that the statement on appeal was insufficient to raise the question. Upon the hearing of the case it made the following order: "That the statement of the case did not contain sufficient evidence to enable the court to decide whether the ground of appeal was well taken; and for the reason that the appeal should be on questions of law and fact, this court dismisses the appeal."

But the law allowed an appeal to be taken on questions of law alone; the appeal taken upon that ground was therefore taken according to law. There was no question that the appeal was not properly taken, and the question whether it ought to have been taken on questions of *law* and *fact* was not a question within the appellate jurisdiction of the court. There was but one question before the court as the ground of appeal; and upon that the appellant was entitled, as a matter of right, to be

heard if the statement of the case contained the evidence upon which the question was raised and decided in the Justice's Court.

All the evidence necessary for the determination of the question was contained in the statement.

The statement shows that Herbert, the plaintiff in the action, claimed the property which was attached as a portion of the machinery of a planing-mill, known as the Enterprise Mill, which consisted of a two-story building and its land and appurtenances, together with the machinery, including the buzz-planer. The basis of the claim was a conveyance of the mill property, executed and delivered on the 1st of January, 1886, by A. M. Stoddard, the attachment debtor. At the date and delivery of the conveyance, A. M. Stoddard was, by himself and his tenant,—his brother, A. C. Stoddard,—in possession of the property; he occupying the upper story of the building for the manufacture of furniture, and his tenant the lower story, in which he carried on the business of the planing mill. The delivery of the deed was accompanied by a delivery of the keys of the upper story of the building; but except as to the legal effect of the delivery of the deed and keys, there was no actual exchange of the possession of any of the property described in the conveyance. The original owner and attachment debtor, by himself and tenant, continued in possession of all the property, and conducted their business in the same way and under the same arrangements as before the conveyance, except that the attachment debtor took a lease of the property, which he held from about the 1st of January until about the 1st of February, 1886, when he surrendered it, and a new lease of the property was made to his tenant, under whom the attachment debtor, without any change of possession of the property, continued to act as engineer of the planing-mill, and had ostensible possession and use of the buzz-planer on the 23d of February, 1886, when the constable,

Carlson, levied upon it as his property to satisfy the attachment against him.

This showing was sufficient to raise the particular point of law upon which the appeal was taken. It was the question which was raised and decided at the trial of the case in the Justice's Court; and the appeal having been taken from the judgment upon that alone, it was *the* question or point of law to be decided upon the appeal.

The appeal vested the Superior Court with jurisdiction to hear and determine the question. In the exercise of that jurisdiction, the court could not decline to determine the only question brought by the statement on appeal within its jurisdiction by arbitrarily ordering a dismissal of the appeal upon the ground that the appeal ought to have been taken on questions of law and fact. Such a disposition of the case was in excess of the jurisdiction of the court with reference to the matter on appeal. (*Hall v. Superior Court*, 68 Cal. 24; *Matthews v. Superior Court*, 68 Cal. 638.)

Let the order dismissing the appeal for the reason assigned be reversed, and the cause remanded for hearing and determination of the question of law upon which the appeal was taken.

SHARPSTEIN, J., concurred.

THORNTON, J., concurred in the judgment.

[No. 20219. In Bank.—September 14, 1886.]

EX PARTE EMIL SHOBERT, ON HABEAS CORPUS.

LOTTERY TICKET — BOND — TIME OF PAYMENT DETERMINED BY CHANCE — PREMIUM ON BOND.—The petitioner was convicted of selling a lottery ticket. The supposed lottery ticket was one of a large number of bonds issued by the city of Brussels. The bond in question is numbered 387, and provided that the holder should be entitled to the repayment of the principal, with interest thereon. It further provided, in effect, that a certain number of the bonds should be payable each year, and in order to ascertain what particular bonds should be payable during a given year, an annual drawing should be had, and the bonds bearing the numbers drawn thereat should become due and payable. It further provided that the holders of bonds bearing the first forty numbers drawn should be paid premiums ranging from twenty-five thousand francs for the first down to two hundred francs for the last. Held, that the bond was not a lottery ticket within the meaning of sections 319 and 321 of the Penal Code.

APPLICATION for a writ of *habeas corpus*. The facts are stated in the opinion.

Charles B. Darwin, for Petitioner.

Lloyd & Wood, for Respondent.

BELCHER, C. C.—The petitioner was accused of selling a lottery ticket in the city of San Francisco, and was tried and convicted. The complaint against him contained a copy of the supposed lottery ticket; and it appears therefrom to have been one of seventy thousand bonds or obligations, for one hundred francs each, which were issued by the city of Brussels in 1853. The bond in question is numbered 387, and provides that the holder shall be entitled to the repayment of his capital, and interest thereon at the rate of three per cent, payable annually. It further provides, in effect, that two hundred of the bonds or obligations shall become due and payable at the end of the first year, two hundred and six at the end of the second year, and two hundred and twelve at the end of the third year, etc., all of them payable in sixty-six years.

To ascertain what particular bonds are payable in any one year, a drawing is to be had on the thirty-first day of December of each year, or if that day be a Sunday or holiday, on the evening before, and the bonds bearing the numbers drawn are then to be paid on the thirty-first day of March following. It is further provided that the holders of the bonds bearing the first forty numbers drawn shall be paid premiums, ranging from twenty-five thousand francs for the first down to two hundred francs for the last.

Is the instrument above described a "ticket, chance, share, or interest in or depending upon the event of any lottery," the sale of which in this state is prohibited by sections 319 and 321 of the Penal Code?

In *Kohn v. Kochler*, 96 N. Y. 362, a similar question was before the Court of Appeals of New York. In that case, the bond in question was one of certain bonds issued by authority of the government of Austria, and by which that government obligated itself to pay the principal of the bonds with interest and a premium named, and also any additional sum which the holder might become entitled to in case the number of his bond drew a prize in a drawing to be had as specified.

The court said: "The evident object and purpose of the government in issuing the bonds was to obtain money for its own use and benefit. According to the true interpretation of the instrument, the government, upon receiving the money, promises to pay the principal, interest, and premium named, and in addition any sum which may be drawn by the holder of the bond, in accordance with the rules and regulations indorsed thereon. This additional sum depends upon a contingency, which is to be decided by lot or chance. Independent of this, the amount and the terms are fixed by conditions of the bond. The substance of the transaction relates to a loan of money to the government, and the provision made for its payment. This is the main object and purpose for

which authority was given to issue the bonds, and they were disposed of evidently having this in view. The provision by which upon a certain contingency the holder of the bond might receive an additional sum was no doubt an inducement held out for the purpose of obtaining money on the same, but it did not constitute the main feature and the substance of the transaction between the government and the purchaser of the bond. It was a mere appendage and an incident to its main purpose, by means of which the holder might by chance receive a larger sum than the principal and interest which the bond itself provided for.

"In loaning money upon these bonds, the holder thereof ran no risk of loss, if the principal and interest were paid, and he took the chances which might arise in case it should be determined by lot that his bond was entitled to a larger sum than the principal, interest, and premium, which he was sure to get in any event. While this latter privilege depended upon chance, it cannot, we think, be held upon any sound theory that it converted the bonds into lottery tickets, and imparted to the loan which was made thereon the character, object, and accompaniments of a mere lottery scheme.

"A government bond of the character of the one involved in this action does not come within the mischief intended to be remedied, or within the scope and purpose of the enactments against lotteries. Such an instrument is not named, nor is it within the purview of the statute or the intention of the law-makers. These bonds have been issued by several of the governments of other countries, and in no sense can they be regarded as being within the inhibition of the statutes of this state, which were intended to suppress lotteries and to prevent citizens from indulging in this species of gambling. The bond in question was an evidence of debt, and a public security of a foreign government, exposed for sale the

same as other securities upon which money is loaned, and its sale did not violate the provisions of the statute already cited. It was not raffled for or distributed by lot or chance, and it cannot be said that the purchase of the same by the plaintiff was within the provisions of section 22 of 1 Revised Statutes, 665."

It is apparent that the reasoning in that case exactly covers this case, and the conclusions reached, we think, are correct.

It follows that the petitioner should be discharged from custody.

Foote, C., and Searls, C., concurred.

The Court.—For the reasons given in the foregoing opinion, it is ordered the petitioner be discharged.

Myrick, J., dissented.

[No. 9818. In Bank.—September 15, 1886.]

JOHN HOWELL, RESPONDENT, *v.* JAMES M. THOMPSON, APPELLANT.

APPEAL — ORDER REFUSING CHANGE OF VENUE — STAY OF PROCEEDINGS. — Under section 949 of the Code of Civil Procedure, an appeal from an order refusing to change the place of trial does not operate to stay proceedings in the lower court.

ID. — JUDGMENT RENDERED BEFORE REVERSAL OF ORDER. — Where an order refusing to change the place of trial is reversed on appeal, a judgment rendered against the appellant before the reversal of the order will be reversed on an appeal therefrom without inquiring as to the commission of errors on the trial, although the appellant may have appeared at the trial and contested the right of the respondent to recover.

APPEAL from a judgment of the Superior Court of Santa Clara County.

The facts are stated in the opinion of the court.

D. L. Smoot, for Appellant.

Charles F. Wilcox, for Respondent.

MCKINSTRY, J.—On the twenty-sixth day of March, 1886, it was adjudged by this court (Department Two), on appeal from an order of the Superior Court of Santa Clara denying a motion of the defendant that the action be moved for trial to San Francisco, that the said order be reversed, and the Superior Court of Santa Clara was by the judgment of this court directed to make and enter an order granting the defendant's motion for a change of the place of trial.

After denying the motion for a change of the place of trial to San Francisco County, the Superior Court of Santa Clara proceeded to try the action, and on the fifteenth day of January, 1884, made and entered a judgment therein in favor of the plaintiff and against the defendant, from which judgment the defendant has appealed.

The defendant now moves this court that the judgment be reversed or set aside.

In *Pierson v. McCahill*, 23 Cal. 249, it was held, under the provisions of the former practice act, that an appeal from an order refusing to change the place of trial stayed all further proceedings in the court below till the appeal was decided. But the Code of Civil Procedure (sec. 949) provides that such an appeal shall not of itself operate a stay.

In *People ex rel. Scannell v. Whitney*, 47 Cal. 584, it was held that an appeal from an order denying a change of venue did not deprive the District Court of jurisdiction to proceed and try the action in such sense that prohibition would lie.

This court has jurisdiction of an appeal from an order denying a motion to change the place of trial; and there can be no doubt that when this court reverses such an

order, and directs that the court below shall make and enter an order transferring a cause for trial to another county, its jurisdiction includes full power and authority to make all orders or judgments necessary to render effectual its judgment on appeal from the order denying the change of the place of trial.

Unless the judgment can be set aside by this or the Superior Court, "the party appealing," as was said in *Pierson v. McCahill, supra*, "might be forced to a trial in the wrong county, before the appeal was determined, and thus he would lose all benefit from his appeal in case the order should be reversed."

It is said that defendant here waived his right to rely on his motion to change the place of trial by appearing at the trial in Santa Clara and contesting the plaintiff's right to recover. We think he was not bound to rely upon his own opinion that the order was erroneous; and as we have seen, section 949 of the Code of Civil Procedure provides that such an appeal does not stay the trial in the court below.

It may be suggested that the motion to set aside the judgment should be made in the court below. Such a course might or might not be regular, but as the judgment of the Superior Court has been brought here by an appeal, and the judgment of this court reversing the order denying the motion to change the place of trial also constitutes a portion of our records, we have before us all the existing evidence bearing on the question involved.

If the fact that a final judgment had been entered by the Superior Court had been made to appear to this court when the appeal from the order refusing a change of the place of trial was heard, this court could have provided in its judgment reversing the order for setting aside the judgment of the court below. This without inquiring whether any error occurred at the trial of the cause below, but simply because the order of this court

would be of no avail if the judgment below was allowed to stand.

The proceedings of the court below with respect to the motion for a change do not appear, and could not appear in the transcript on appeal from the judgment, since the code gives a direct appeal from such an order, and it cannot be properly reviewed on an appeal from the judgment. The judgment is a fact, and whenever the fact is made to appear either to this court or to the Superior Court, in connection with a previous order that the cause be transferred to another county for trial, the judgment should be set aside, because it is an apparent, if not a real, obstacle to the operative effect of an order changing the trial to another county.

Judgment reversed.

Ross, J., Thornton, J., McKee, J., Morrison, C. J., Sharpstein, J., and Myrick, J., concurred.

[No. 20235. In Bank.—September 15, 1886.]

EX PARTE FRANK JAYNES, ON HABEAS CORPUS.

CONTEMPT — REFUSAL OF TELEGRAPH EMPLOYEE TO PRODUCE MESSAGES — SUBPOENA DUCES TECUM. — An employee of a telegraph company, having charge of messages, transmitted by it, is not guilty of contempt for refusing to obey a subpoena *duces tecum* commanding him to search for and produce all messages from and to a large number of persons therein named, between specified dates. The subpoena must identify the particular messages required.

APPLICATION for a writ of *habeas corpus*. The petitioner is an employee of the Western Union Telegraph Company, having charge of all telegrams transmitted from or received at the offices of the company in the cities of San Francisco and Oakland, and the town of San Rafael, in the state of California. On the 3d of February, 1886, a subpoena *duces tecum* was regularly issued out of the

Superior Court of the city and county of San Francisco, in an action there pending, commanding him to search for and produce any and all telegrams transmitted to or from such places by a large number of persons therein named, between specified dates. This the petitioner refused to do unless the particular messages sought were identified. For his refusal, he was adjudged guilty of contempt of court, and committed to jail. The further facts are stated in the opinion of the court.

P. G. Galpin, for Petitioner.

The COURT.—The petitioner was served with subpoena *duces tecum*, requiring him to produce telegraphic messages, but there was nothing to point his attention to any particular message or messages; he was required to search for and produce all messages from a number of persons to many other persons between certain specified dates. The service of the subpoena was an evident search after testimony. The petitioner was not bound to respond, and committed no contempt in failing to examine the papers under his control, to ascertain if any such messages had been sent or received.

The petitioner is discharged.

[No. 11205. Department Two.—September 16, 1886.]

ISABELLA B. BIVEN, RESPONDENT, *v.* I. S. BOSTWICK, APPELLANT.

PLEADING — ALLEGATION OF TIME OF PROMISE — EVIDENCE.—In an action to enforce a promise alleged to have been made by the defendant on a certain day, the plaintiff is entitled to recover upon proof that the promise was made at any time before the commencement of the action. He need not prove that it was made on or about the time alleged in the complaint.

APPEAL from a judgment of the Superior Court of San Joaquin County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

W. L. Dudley, for Appellant.

J. H. Budd, and *J. A. Louthit*, for Respondent.

THORNTON, J.—This action is brought on a promise by the defendant to pay over a sum of money in his hands to the plaintiff.

The questions presented relate mainly to the sufficiency of the evidence to sustain the verdict of the jury on certain special issues submitted to it. The evidence, in our judgment, was sufficient for that purpose.

The defendant requested the court to instruct the jury as follows:—

This action is brought to enforce a special promise alleged to have been made by the defendant to Jesse A. Mitchell to pay a certain indebtedness from said Mitchell to the plaintiff in this action; and before the plaintiff can recover, you must be satisfied from the evidence that the defendant, at or about the time charged in the complaint, "promised the said Mitchell to pay to the plaintiff the amount or residue left in the hands of Bostwick after paying to himself the amount secured by the mortgage of Mitchell to Bostwick."

The instruction was refused, and defendant excepted.

The plaintiff was entitled to recover if the promise was made at any time before the commencement of the action. It need not have been made at or about the time charged in the complaint. The court did not, therefore, err in refusing the instruction asked. There is no error in the record.

Judgment and order affirmed.

McKEE, J., and SHARPSTEIN, J., concurred.

[No. 20216. Department One.—September 18, 1886.]

THE PEOPLE, RESPONDENT, *v.*, HARRY FRANKLIN,
APPELLANT.

CRIMINAL LAW — ASSAULT WITH DEADLY WEAPON WITH INTENT TO MURDER — CONVICTION FOR LESSER OFFENSE — INSTRUCTION. — In a prosecution for an assault with a deadly weapon with intent to murder, the omission of the court to instruct the jury as to its power to convict for a lesser crime necessarily included in the charge is not error, if the evidence would not warrant a conviction for the lesser crime, or if a request for such an instruction was not made by the defendant.

ID. — EVIDENCE OF DRUNKENNESS — ADMISSIBILITY OF — MUST BE RECEIVED WITH CAUTION. — In such a case, evidence of the drunkenness of the defendant must be received by the jury with great caution, and can be considered by them only for the purpose of determining the degree of the crime by showing that his mental condition at the time of the assault incapacitated him from deliberately forming an intention to murder; but it cannot be considered in determining whether he committed an assault with a deadly weapon with intent to inflict great bodily harm.

ID. — DEADLY WEAPON DEFINED. — A deadly weapon is one likely to produce great bodily harm. A knife may be such a weapon.

APPEAL from a judgment of the Superior Court of Napa County, and from an order refusing a new trial.

The sixth instruction was to the effect that the drunkenness of the defendant at the time of the commission of the crime was no excuse therefor, and evidence thereof should be received with great caution, and could only be considered for the purpose of determining the degree of the crime by showing that the mental condition of the defendant at the time of the assault was such that he was incapable of deliberately forming an intention to murder; but that in determining whether the defendant committed an assault with a deadly weapon with intent to inflict great bodily harm, evidence of his intoxication could not be considered. The ninth instruction was to the effect that a deadly weapon is one likely to produce great bodily harm, and that the knife with which the assault in question was committed was such a weapon. The further facts are stated in the opinion of the court.

Pinney & Gesford, for Appellant.

Attorney-General Marshall, and *Henry Hogan*, for Respondent.

Ross, J.—The defendant was charged by information with the crime of assault with a deadly weapon with intent to murder one Hemmenway, and was convicted of assault with a deadly weapon with intent to do great bodily harm.

The case shows that defendant, while very drunk, assaulted and cut with a knife the said Hemmenway, who was a stranger to him, and whom he casually met on a railroad track.

It is objected on the part of the appellant that the court below erred in its eighth instruction, in that it omitted to inform the jury that they might find defendant guilty of a simple assault. The instruction reads:—

“If, after a due and careful consideration of all the evidence, you entertain a reasonable doubt of the guilt of the defendant upon the charge of an assault with intent to commit murder, it will be your duty then to inquire as to whether he may be guilty of any lesser offense necessarily included therein. There is one, as follows: assault with a deadly weapon, which is an assault committed upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury.”

The objection is not well taken, for two reasons: in the first place, because upon the evidence defendant could not have been properly convicted of a simple assault, and the court was therefore right in omitting to instruct in respect to that offense; and secondly, if defendant wanted the attention of the jury specifically called to each of the lesser crimes necessarily included in the charge set out in the information, he should have requested the court to do so, which he does not appear to have done.

The sixth instruction, in respect to the intoxication of the defendant, was substantially correct. (*People v. Lewis*, 36 Cal. 531; *People v. Williams*, 43 Cal. 344; *People v. Ferris*, 55 Cal. 588; *People v. Turner*, 65 Cal. 540.)

The ninth instruction was in accordance with the ruling of this court in *People v. Fuqua*, 58 Cal. 247, and was correct.

Judgment and order affirmed.

McKINSTRY, J., and MYRICK, J., concurred.

[No. 20212. Department One.—September 18, 1886.]

THE PEOPLE, RESPONDENT, *v.* FRANK CARRILLO.
APPELLANT.

CRIMINAL LAW — GRAND LARCENY — ERRONEOUS INSTRUCTION.— In a prosecution for grand larceny, an instruction, quoted in the opinion, to the effect that the jury might find the defendant guilty, although they might not be entirely satisfied that he, and no other person, committed the alleged offense, *held*, erroneous.

ID. — FAILURE TO REDUCE INSTRUCTIONS TO WRITING.— In a criminal prosecution, the giving of oral instructions to the jury, which are not reduced to writing either by the judge or any other person, nor taken down by the short-hand reporter, is error.

APPEAL from a judgment of the Superior Court of Sonoma County, and from an order refusing a new trial.

The defendant was convicted on circumstantial evidence of the crime of grand larceny. The further facts are stated in the opinion of the court.

J. T. Campbell, and *J. T. Noon*, for Appellant.

Attorney-General Marshall, and *Darwin C. Allen*, for Respondent.

McKINSTRY, J.—In the margin, opposite to instruction No. 5 requested by the prosecution, the judge of the Superior Court wrote, “Given,—the word ‘possible’

inserted in reading in two places." There is nothing to indicate where the word was inserted "in reading." The instruction to that extent was not in writing; because there is no evidence in writing of the instruction as actually given. But it is not necessary to say that for this reason alone the judgment should be reversed.

As reduced to writing, the instruction is as follows:—

- 1 "The jury must be satisfied from
- 2 the evidence of the guilt of the
- 3 defendant beyond a reasonable
- 4 doubt before they can legally find
- 5 him guilty of the crime charged
- 6 against him; but in order to justi-
- 7 fy the jury in finding the de-
- 8 fendant guilty of said crime, it
- 9 is not necessary that the jury
- 10 should be satisfied from the evidence
- 11 beyond the possibility of a doubt.
- 12 All that is necessary in order to
- 13 justify the jury in finding the de-
- 14 fendant guilty is that they shall
- 15 be satisfied from the evidence of the
- 16 defendant's guilt to a moral cer-
- 17 tainty and beyond a reasonable
- 18 doubt, although they may not be en-
- 19 tirely satisfied (beyond a possible doubt) from the evi-
- dence
- 20 that the defendant, and no other
- 21 or different person, committed the
- 22 alleged offense; and if the jury
- 23 are satisfied from the evidence
- 24 beyond a reasonable doubt
- 25 that the defendant committed
- 26 the crime charged against him,
- 27 they are not legally bound to
- 28 acquit him because they
- 29 may not be entirely

30 satisfied that the defendant,
31 and no other or different
32 person, committed the alleged
33 offense."

The instruction was erroneous. (*People v. Brown*, 56 Cal. 405; *People v. Kerrick*, 52 Cal. 446; *People v. Padilla*, 42 Cal. 535; *People v. Phipps*, 39 Cal. 326.)

The insertion of the words "beyond a possible doubt," inserted in line 19, still left it to the jury to find the defendant guilty, although they might not be "entirely satisfied that the defendant, and no other person, committed the alleged offense."

But the court did not simply read the instruction as reduced to writing, but accompanied the reading with other oral language claimed to modify and render unobjectionable the written charge. Such oral language was not reduced to writing "by the judge or any one else, nor was it taken down by the short-hand reporter."

The bill of exceptions shows that the judge read the instruction down to and including the word "satisfied," in line 30, and then said "beyond all possible doubt"; after which he proceeded to read the rest of the instruction as written. This was error. (*People v. Hersey*, 53 Cal. 575, and cases there cited.)

Judgment and order reversed, and cause remanded for a new trial.

Ross, J., and MYRICK, J., concurred.

[Nos. 11461, 11462, 11463.—Department One.—September 18, 1886.]

KERN VALLEY WATER COMPANY, RESPONDENT,
v. DALLAS McCORD ET AL., APPELLANTS.

CHARLES LUX ET AL., RESPONDENTS, v. STINE
CANAL COMPANY, APPELLANT.

HENRY MILLER ET AL., RESPONDENTS, v. DALLAS
McCORD ET AL., APPELLANTS.

**CHANGE OF VENUE — DISQUALIFICATION OF JUDGE — RECEIPT OF
GENERAL RETAINER.** — A change of the place of trial may be had
on the ground that the judge of the court in which the action was
brought had received a general retainer from one of the parties.

APPEALS from orders of the Superior Court of Kern
County changing the place of trial.

The facts are stated in the opinion of the court.

Louis T. Haggin, and Garber, Thornton & Bishop, for
Appellants.

Stetson & Houghton, for Respondents.

Ross, J. — These cases have been argued and submitted
together. They are appeals from orders changing the place
of trial, — the motion in that behalf in each case being
based upon the alleged disqualification of the presiding
judge.

It is urged for the appellants that the affidavits did not
show or tend to show that the judge was disqualified; and
further, that it was not competent for him to pass upon the
question of his own disqualification.

In respect to two of the cases, — Nos. 11462 and 11463,
— the judge stated from the bench that he had received
a general retainer from one of the parties defendant, and
therefore considered himself disqualified to sit in judg-
ment in the cases, and accordingly made the order of
transfer. Although the cases may not perhaps come
within the strict letter of the statute which provides,

among other things, that no judge shall sit or act as such in any action or proceeding "when he has been attorney or counsel for either party in the action or proceeding," we do not think an order of transfer made upon the ground that the judge had been under a general retainer from one of the parties should be reversed, but on the contrary, should meet with approval.

In respect to the other case, however, — No. 11461, — no such ground existed, nor indeed any ground, for its transfer. The county of Kern being the proper county, and the judge of that county not being in any way disqualified, the order changing the place of trial should not have been made.

In cases numbered respectively 11462 and 11463, order affirmed, and in case numbered 11461 the order is reversed.

MYRICK, J., and MCKINSTRY, J., concurred.

Hearing in Bank denied.



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INDEX.

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ADVERSE POSSESSION.

1. **TITLE ACQUIRED BY — PAYMENT OF TAXES ESSENTIAL.** — Under section 325 of the Code of Civil Procedure, the title to a piece of land forming part of a larger tract, which is assessed as an entirety to the real owner, cannot be acquired by adverse possession unless the adverse claimant pays or offers to pay the taxes on the land in his possession. — *McNoble v. Justiniano*, 395.
2. **GRANTOR AND GRANTEE — ADVERSE POSSESSION BY GRANTOR — SUBSEQUENTLY ACQUIRED TITLE.** — A grantor of land who remains in the adverse possession thereof for the period prescribed by the statute of limitations obtains a title as against his grantee, and a title subsequently acquired by him inures to his benefit, and not to the benefit of the grantee. — *Garabaldi v. Shattuck*, 511.

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1. **PRACTICE — REQUISITE STATEMENTS OF — SETTING ASIDE JUDGMENT BY DEFAULT.** — On motion by a defendant to set aside a judgment by default, the affidavit of merits must state that he has fully and

AFFIDAVIT OF MERITS (Continued).

fairly stated the facts of the case to his counsel. A statement in the affidavit that he has fully stated the facts of his defense to his counsel is insufficient. — *Morgan v. McDonald*, 32.

2. **COURT CANNOT WAIVE PROPER AFFIDAVIT.** — On such a motion the court has no authority to waive a proper affidavit of merits. — *Id.*

AGENCY.

1. **AGENT FOR COLLECTION — RELEASE OF DEBT BY PRINCIPAL — PROMISSORY NOTE — ACTION ON BY AGENT.** — Where the owner of a promissory note delivers it indorsed in blank to another, with power to manage, transfer, or dispose of it, under an agreement whereby its proceeds are to be equally divided between them, the transferee is a mere agent for collection, and a release of the note subsequently executed by the owner to the payee is a defense to an action against him by the agent. — *Flanagan v. Brown*, 254.
2. **POWER COUPLED WITH INTEREST — REVOCATION OF AGENCY — CONSIDERATION.** — In such a case, the power of the agent is not coupled with an interest within the meaning of section 2356 of the Civil Code, and may be revoked by the principal, notwithstanding the contract of agency was founded upon a valuable consideration. — *Id.*
3. **POWER OF ATTORNEY — REVOCATION — INTEREST OF AGENT — CONSIDERATION.** — A power of attorney, although expressly stipulated to be irrevocable, may be revoked at the will of the principal, if the agent has no interest in its execution, and there is no valid consideration therefor. — *Frink v. Roe*, 296.
4. **POWER WHEN IRREVOCABLE.** — Where a power of attorney is given for a valuable consideration, or is coupled with an interest, or is part of a security for the payment of money or the performance of some other lawful act, it is irrevocable, whether so expressed upon its face or not. — *Id.*
5. **DEATH OF PRINCIPAL.** — The death of the principal revokes a power of attorney, except where the power is coupled with an interest in the thing actually vested in the agent. — *Id.*
6. **POWER COUPLED WITH INTEREST DEFINED.** — To constitute a power coupled with an interest, the interest must be in the subject-matter over or concerning which the power is to be exercised; an interest in that which is to be produced by the exercise of the power is not sufficient. — *Id.*
7. **POWER TO SELL REALTY — INTEREST OF AGENT IN SUBJECT-MATTER.** — An agent to sell real property has not a power coupled with an interest, unless the instrument containing the power gives him such an interest or estate in the land as will entitle him to execute the power in his own name. — *Id.*
8. **FRAUDULENT CONVEYANCE BY AGENT — WHEN NOT VOID.** — Where a sale of real estate is made by an agent under a power authorizing him to sell and convey, and it appears upon the face of the deed when compared with the power that he has complied with the requirements of the latter, the legal title will pass to the grantee,

AGENCY (Continued).

and remain in him and those holding under him until set aside by a court of equity, notwithstanding the agent may have violated his duty to the principal by fraudulent practices which do not appear in the deed. — *Id.*

9. **CONVEYANCE IN EXCESS OF AUTHORITY — WHEN VOID.** — If, on the contrary, the agent acts without and in excess of the authority conferred upon him, and his want of authority is apparent upon the face of the record, his attempted action is void, and a conveyance under such circumstances is not simply voidable, but absolutely void, and advantage may be taken of it in whatever court or proceeding it may be proffered as a basis of title. — *Id.*

10. **RECORDING POWER OF ATTORNEY — NOTICE TO SUBSEQUENT PURCHASERS.** — A power of attorney to sell and convey real estate, if duly recorded, is notice to subsequent purchasers dealing with the agent, in relation to the property, of the terms of the agency. — *Id.*

11. **EVIDENCE TO SHOW INTEREST OF AGENT.** — The action was brought to recover the possession of certain land originally owned by one Rising, who conveyed it by an absolute deed to one Hodgdon. At the time of the conveyance, Hodgdon executed to Rising a power of attorney authorizing him to sell and convey the land. The plaintiff claims title under a deed executed by Rising, as the attorney in fact of Hodgdon, after the death of the latter. *Held*, that parol evidence was inadmissible to show that the power given to the attorney was coupled with an interest in the land, or that he retained an interest therein after the execution of his deed to Hodgdon. — *Id.*

12. **EVIDENCE TO INTERPRET OR ENLARGE POWERS.** — Parol evidence is admissible to interpret the powers conferred by a power of attorney, but not for the purpose of enlarging them or conferring others not enumerated. — *Id.*

13. **POWER TO SELL — AGENT CANNOT SELL IN PAYMENT OF HIS OWN DEBTS — NOTICE BY PURCHASER.** — An agent authorized to sell and convey the property of his principal cannot, as against the principal, convey it in trust for the payment of his own debts to one who has notice of the terms of the agency. — *Id.*

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AMENDMENTS.

1. **AMENDMENTS — JOINDER OF PERSONAL REPRESENTATIVE.** — Where a general leave to amend has been obtained, the plaintiff has a right to join other proper parties as defendants without special permission so to do. — *Louvall v. Gridley*, 507.

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2. **CHANGE OF NATURE OF ACTION— MISJOINDER OF CAUSES OF ACTION.** — The action was brought to quiet title to certain land. The original complaint alleged that the plaintiff's devisor was the owner of the land, and conveyed the same by a deed absolute in form to one Gridley in 1866; that the deed was intended as a mortgage to secure an indebtedness, which had subsequently been fully paid; that Gridley promised to reconvey the property, but died without having done so. It was further alleged that the deed constituted a cloud on the title of the plaintiff. The widow and children of Gridley were made parties defendant. The plaintiff subsequently filed an amended complaint, making the administratrix of the estate of Gridley also a defendant; and further alleging that the plaintiff's devisor remained in the actual, open, notorious, uninterrupted, and exclusive possession of the land, claiming the same as his own, and adversely to every other right, from the time of the execution of the deed until his death in 1883. The prayer was for a decree establishing the ownership of the plaintiff to the land, and that the defendants had no right or title therein; that the deed be declared a mortgage and canceled of record, and that the title of the plaintiff be quieted. *Held*, on demurrer and motion to strike out, that the amended complaint did not materially change the nature of the action, and that several causes of action were not improperly joined. — *Id.*
3. **PLEADINGS— DISCONTINUANCE OF PARTIES — CHANGE OF NATURE OF ACTION.** — The action was originally brought by several plaintiffs against the defendant Walker and others, to restrain Walker from interfering with certain water rights owned by the plaintiff, Ware. The defendants other than Walker were joined as such because they refused to become plaintiffs. An amended complaint was subsequently filed, in which Ware alone was named as plaintiff, and Walker as defendant. *Held*, that the amended complaint did not change the nature of the action. — *Ware v. Walker*, 591.
4. **PRACTICE — AMENDMENT TO ANSWER.** — The refusal to allow a defendant to file an amended answer setting up matters which could be proved under the averments of the original answer is not erroneous. — *Edgar v. Stevenson*, 286.
5. **AMENDMENT TO ANSWER — PENDENCY OF PRIOR ACTION — DISCRETION.** — Permitting the defendant at the close of the trial to amend his answer by setting up the pendency of another action involving the same cause of action, *held*, not an abuse of discretion under the circumstances of the case. — *Coubrough v. Adams*, 374.
6. **PRIOR ACTION FOR ACCOUNTING — SUBSEQUENT ACTION ON CERTAIN ITEMS.** — The pendency of an action for an accounting may be pleaded in abatement of a subsequent action between the same parties founded on one or more items involved in the prior action. — *Id.*

See JUDGMENT, 2; NEW TRIAL, 4.

APPEAL.

1. **CONTEMPT PROCEEDINGS.** — No appeal lies from an order dismissing a proceeding for an alleged contempt of court. — *Sanchez v. Newmann*, 210.

APPEAL (Continued).

2. REVIEW OF ORDER SETTING ASIDE.—An order setting aside a decree settling the final account of an executor, although not directly appealable, may be reviewed on an appeal by the executor from a subsequent decree settling his final account.—*Estate of Cahalan*, 604.
3. APPEAL FROM JUDGMENT—SECOND APPEAL IS VOID—DISMISSAL.—Where an appeal from a judgment has been regularly taken and perfected by an undertaking, and is pending in the Supreme Court, a second appeal from the judgment, attempted to be taken by the same party, is nullity, and will be dismissed.—*Brown v. Plummer, mer*, 337.
4. DIVORCE—ALIMONY AND COUNSEL FEES—CERTIFICATE TO IDENTITY OF PAPERS.—On an appeal from an order for counsel fees and alimony, made *pendente lite* in an action of divorce, the certificate of the trial judge is a sufficient identification of the papers used on the hearing of the motion.—*Schammel v. Schammel*, 72.
5. MOTION TO DISMISS APPEAL—CERTIFICATE MAY BE FILED ON HEARING.—If the transcript fails to contain such a certificate or other evidence of identification, and a motion is made to dismiss the appeal on that ground, the appellant may cure the omission, under rule 13 of the Supreme Court, by presenting and filing at the hearing of the motion to dismiss a certificate of the judge to the identity of the papers.—*Id.*
6. ERROR IN ADMISSION OF EVIDENCE—EXCEPTION—SPECIFICATION OF ERROR.—Alleged error in the admission of evidence will not be reviewed on appeal, unless the record shows that the evidence was objected to, and an exception reserved at the trial, notwithstanding the statement on motion for a new trial specifies the admission of the evidence as one of the errors on which the party moving would rely.—*Alameda Macadamizing Co. v. Williams*, 534.
7. CRIMINAL LAW—TRANSCRIPT MUST SHOW SERVICE OF NOTICE—DISMISSAL.—The transcript on appeal in a criminal case must show that the notice of appeal was served on the attorney of the adverse party; otherwise the appeal will be dismissed.—*People v. Bell*, 33.
8. INSOLVENCY—ORDER SETTLING ACCOUNT—ABSTRACT OF EVIDENCE—RECORD.—On an appeal from an order settling the final account of an assignee in insolvency, a paper embodied in the transcript, certified by the trial judge as containing “an abstract of the evidence given on the hearing of the settlement of the account of the assignee,” forms no part of the record, and will be disregarded.—*Estate of Tanner*, 22.

See BAIL; BILL OF PARTICULARS; CRIMINAL LAW, 2; ESTATE OF DECEDENT, 12; FINDINGS, 4; HUSBAND AND WIFE, 6; INSTRUCTIONS, 3, 4; JUSTICES' COURT, 1-3; NEGLIGENCE, 3; PLACE OF TRIAL, 2, 3; SUMMONS, 4.

APPEARANCE. See JUSTICES' COURT, 2.

APPROPRIATION. See WATER AND WATER RIGHTS, 3-5.

ARBITRATION. See INSURANCE, 2; STATUTE OF LIMITATIONS, 1.

ARREST. See MALICIOUS PROSECUTION.

ASSAULT WITH DEADLY WEAPON. See CRIMINAL LAW, 3-10.

ASSESSMENT. See CORPORATIONS, 2; EVIDENCE, 28; STREET ASSESSMENT; SWAMP LANDS, 3, 4; TAXATION.

ASSIGNMENT. See PARTNERSHIP, 3.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. PARTNERSHIP—PREFERENCE GIVEN TO FIRM CREDITORS.—An assignment for the benefit of creditors, made by a partnership, of their individual as well as of their partnership property, is void as to creditors, if a preference is given to the partnership creditors over the individual creditors as to the individual property.—*O'Kane v. Hyde*, 6.

2. VALIDITY OF ASSIGNMENT—GARNISHED DEBTOR MAY DISPUTE.—On the 22nd of March, 1879, the firm of Daly & Hawkins made an alleged assignment for the benefit of their creditors to the plaintiff. At that time, the defendant, George Hyde, was indebted to the firm of Daly & Hawkins on two promissory notes in the sum of \$3,445, and the firm were indebted to the Hibernia Savings and Loan Society in the sum of \$6,000. On the 27th of March, 1879, in an action brought by the Hibernia Savings and Loan Society against Daly & Hawkins, the debt due by Hyde to them was garnished, and was subsequently paid by him in satisfaction of the judgment recovered in the action by the Hibernia Savings and Loan Society. On the 10th of April, 1879, the assignee, O'Kane, commenced an action against Daly & Hawkins, the Hibernia Savings and Loan Society, and other general creditors of Daly & Hawkins, to be discharged of his trust, and in the complaint therein enumerated the notes as among the assets delivered to him by Daly & Hawkins. The Hibernia Savings and Loan Society in its answer denied the right of O'Kane to be discharged of his trust, and prayed that the assignment be adjudged void. On the 7th of October, 1880, an order was made by the superior judge before whom the suit was pending, directing O'Kane to bring an action against the defendant Hyde for the collection of the notes. The present action was thereupon brought. The answer of the defendant set up the payment of the notes under the garnishment to the Hibernia Savings and Loan Society, and alleged that the assignment to the plaintiff was void because it gave a preference to the partnership creditors of Daly & Hawkins over the individual creditors as to the individual property. On the 4th of December, 1880, a judgment in the case of *O'Kane v. Daly et al.* was rendered, discharging the plaintiff from his trust as assignee. Held, that the action of *O'Kane v. Daly et al.* was not, as to the defendant or the Hibernia Savings and Loan Society, an adjudication as to the validity of the assignment, and that the defendant could dispute its legality.—*Id.*

ASSOCIATIONS.

1. UNINCORPORATED ASSOCIATION—REMOVAL OF OFFICERS—RIGHTS OF SECEDING MEMBERS.—Where the laws governing a voluntary

ASSOCIATIONS (Continued).

unincorporated association provide a remedy within the association for any offense committed by its officers, no opposition by the officers to the authority under which they act in the performance of their functions, nor irregularity in the performance thereof, will authorize a part of the members of the association to secede for the purpose of expelling its regularly elected officers, declaring their offices vacant, and constituting themselves successors. — *McCallion v. Hibernia Savings and Loan Society*, 163.

2. **BENEVOLENT ASSOCIATION — BY-LAWS — POWER OF TRUSTEES TO INVEST MONEY.** — A member of a benevolent association, who is acquainted with its by-laws, is chargeable with notice of the restrictions thereby imposed upon the power of the trustees to invest the funds of the association. — *Red Jacket Tribe No. 28 v. Gibson*, 128.

ATTACHMENT.

CONTRACT FOR SALE OF LAND — INSUFFICIENT ATTACHMENT NOT AN INCUMBERANCE. — An attachment purporting to have been levied on certain land, but which was not served or levied as required by law, or in such a manner as to constitute a lien thereon, is not an encumbrance within the meaning of an agreement to sell the land free from all encumbrances. — *Gates v. McLean*, 40.

ATTORNEY. See **AGENCY; FALSE REPRESENTATIONS**, 1; **NEGLIGENCE**, 2, 3.

BAGGAGE. See **COMMON CARRIER**, 1-4, 6, 7.

BAIL.

CRIMINAL LAW — ADMISSION TO BAIL PENDING APPEAL — APPLICATION FOR. — The Supreme Court will not admit a prisoner to bail pending an appeal taken by him from a judgment convicting him of a felony, on an application made to it in the first instance, nor until after the determination upon its merits of an application for bail before the judge who tried the cause. — *People v. January*, 34.

BENCH-WARRANT. See **EVIDENCE**, 10.

BENEVOLENT ASSOCIATIONS. See **ASSOCIATIONS**.

BILL OF PARTICULARS.

FAILURE TO FURNISH — EXCEPTION TO EVIDENCE — DEMAND — APPEAL. — An exception by the defendant to the introduction of evidence in support of the claim of the plaintiff, because of his failure to furnish a bill of particulars, will not be considered on appeal if the record fails to show that any demand for a bill of particulars was made by the defendant. — *Kelly v. Murphy*, 560.

BOND. See **LOTTERY TICKET; SURETIES.**

BOOKS OF ACCOUNT. See **MORTGAGE**, 2.

BOUNDARIES.

1. **SEASHORE—OWNER OF ADJOINING LAND TAKES TO HIGH-WATER MARK—PRESUMPTION.**—In the absence of evidence to the contrary, it is presumed that the owner of land bordering on the seashore holds only to ordinary high-water mark, and that all the seashore fronting his land lying between high and low water mark is the property of the state.—*Long Beach Land and Water Company v. Richardson*, 206.
2. **EJECTMENT—LAND INCLUDED IN QUARTER-SECTION—EVIDENCE TO CONTRADICT SURVEY.**—The action was brought to recover the possession of certain land. The plaintiff is the owner, by title derived from the United States government, of the southeast quarter of section 13 in township 11 north, range 9 west, Mount Diablo base and meridian, and the defendant Polack is the owner of the northeast quarter of the same section. The official plat of the approved survey of the township located the premises in controversy in the northeast quarter of the section. The patent under which the plaintiff claims describes the land conveyed as the southeast quarter of the section, “according to the official plat of the survey returned to the general land-office by the surveyor-general.” Held, that neither parol evidence nor a private survey was admissible to show that the premises in controversy were situated in the southeast quarter of the section.—*Chapman v. Polack*, 487.
3. **MAP REFERRED TO IN DEED.**—A map of a tract of land, having lines drawn upon it marking the boundaries and the natural objects upon its surface delineated, which is referred to in a deed containing a description of the premises therein conveyed, is to be regarded as giving the true description of the land conveyed, as much as if it was expressly recited and marked down in the deed itself.—*Id*.

See **MINES AND MINING**, 1-3; **MUNICIPAL CORPORATIONS**; **STREET ASSESSMENT**, 4.

BREACH OF CONTRACT. See **CONTRACT**, 1, 2, 4.

BUILDING CONTRACT. See **CONTRACT**, 4; **MECHANIC'S LIEN**.

BURGLARY. See **CRIMINAL LAW**, 12.

BY-LAWS. See **ASSOCIATIONS**, 2.

CANCELLATION. See **FRAUDULENT CONVEYANCE**, 6, 7; **TRUST**, 10.

CEMETERY. See **TRUST**, 3-9.

CERTIFICATE. See **APPEAL**, 4, 5; **CORPORATIONS**, 1; **PARTNERSHIP**, 2, 3; **PUBLIC LANDS**, 2; **SUMMONS**, 5.

CERTIORAR. See JUSTICE'S COURT, 1.

CHALLENGE. See JURY AND JURORS, 2.

CHANGE OF VENUE. See PLACE OF TRIAL.

CHASTITY. See SLANDER, 1.

CHATTEL MORTGAGE. See GROWING CROPS.

CHECK. See CRIMINAL LAW, 32-34.

CITIZEN. See ESTATE OF DECEDED, 3.

CLAIM. See ESTATE OF DECEDED, 16, 19.

CLOUD ON TITLE. See AMENDMENTS, 2; INJUNCTION, 4.

COMMISSIONS. See ESTATE OF DECEDED, 15.

COMMON CARRIER.

1. LUGGAGE.—The term "luggage," as used in the Civil Code, has the same meaning as the word "baggage."—*Pfister v. Central Pacific Railroad Company*, 169.
2. MONEY WHEN NOT LUGGAGE.—Under section 2181 of the Civil Code, money belonging to a passenger on a railroad, and intended for trade, business, investment, or transportation, and not for the use of the passenger while traveling, is not luggage.—*Id.*
3. RAILROAD — PASSENGER — CONTRACT IMPLIED BY TICKET.—A railroad ticket entitling the purchaser to transportation in the first-class passenger-coaches of the seller between the points indicated thereon gives him a right to have his luggage—not exceeding the quantity specified in the ticket—transported at the same time free of charge; but it does not give the purchaser a right to travel in a baggage, express, or freight car, or to transport, either in his own charge or that of the railroad, any merchandise or property not included in the term "luggage."—*Id.*
4. COUNTY TREASURER — CANNOT CARRY MONEY AS A PASSENGER.—A county treasurer who purchases a railroad ticket entitling him to first-class passenger transportation has no right to carry with him in a passenger train certain money which he is required by law to pay over to the state treasurer at the place of destination, although the railroad had for many years previously acquiesced in such a practice, and accepted him as a passenger with knowledge that he had the money with him.—*Id.*
5. COUNTY TREASURER NOT A PUBLIC MESSENGER.—A county treasurer traveling with money which he is obliged by law to pay into the state treasury is not a public messenger within the meaning of the act of April 4, 1864, requiring the Central Pacific Railroad to carry such messengers over their road free of charge.—*Id.*

COMMON CARRIER (Continued).

6. DUTY OF CARRIER AS TO ACCEPTING AND CARRYING.—Under section 2169 of the Civil Code, a common carrier of goods is under no obligation to accept and carry all personal property that may be offered. Its duty is confined to accepting and carrying property of a kind that it undertakes or is accustomed to carry. — *Id.*
7. EXPRESS FACILITIES — RAILROAD NEED NOT FURNISH TO ALL.—In the absence of a usage to that effect, or of some statute requiring them so to do, it is not the duty of railroad companies to furnish facilities for the transportation of express matter to all alike who demand them. — *Id.*
8. NEGLIGENCE — STAGE-COACH — BREAKING OF WHEEL — EVIDENCE.—The breaking of a wheel of a stage-coach is *prima facie* evidence that the wheel was defective, and in the absence of evidence showing that it was sound, or that the defect was latent, and could not be discovered by examination, is sufficient to establish the negligence of the carrier, and its liability for an injury to a passenger occasioned thereby. — *Laurence v. Green*, 417.
9. BURDEN OF PROOF — DEFENDANT MUST REBUT PRIMA FACIE NEGLIGENCE.—In an action to recover for such an injury, after the plaintiff had shown that the accident was caused by the breaking of the wheel, the burden of proof was on the defendant to show that the wheel was not defective, or if so, that the defect did not cause the accident. — *Id.*
10. CONDUCT OF PERSON IN APPARENT DANGER.—A stage-coach proprietor is liable for an injury to a passenger caused by the negligent overturning of the coach, notwithstanding the passenger contributed to the injury by his own rashness, imprudence, or indiscretion at the time of the accident, if he did only what a person of ordinary prudence would probably have done under the same circumstances. — *Id.*

COMMUNITY PROPERTY. See **ESTATE OF DECEDENT**, 19; **HOMESTEAD**, 1; **HUSBAND AND WIFE**, 1-4; **INJUNCTION**, 4.

COMPROMISE.

ACTION — ATTEMPT TO COMPROMISE — EFFECT OF.—The rights of the parties to an action are not affected by an attempt and failure to compromise the litigation, irrespective of the cause which produced the failure. — *McCallion v. Hibernia Savings and Loan Society*, 163.

CONSENT. See **CRIMINAL LAW**, 36, 37; **FRAUDULENT CONVEYANCE**, 5; **GUARDIAN AND WARD**, 1; **MINES AND MINING**, 4.

CONSIDERATION. See **AGENCY**, 2-4; **CONTRACT**, 5; **HUSBAND AND WIFE**, 3; **MARRIED WOMEN**; **SPECIFIC PERFORMANCE**, 5.

CONSTITUTIONAL LAW. See **CRIMINAL LAW**, 4, 11; **ESTATE OF DECEDENT**, 1, 2; **LICENSE**, 1.

CONTEMPT.

1. **REFUSAL OF TELEGRAPH EMPLOYEE TO PRODUCE MESSAGES — SUBPOENA DUCES TECUM.**—An employee of a telegraph company, ha-

CONTEMPT (Continued).

ing charge of messages transmitted by it, is not guilty of contempt for refusing to obey a subpoena *duces tecum* commanding him to search for and produce all messages from and to a large number of persons therein named, between specified dates. The subpoena must identify the particular messages required. — *Eas parte Jaynes*, 638.

2. **WITNESS — REFUSAL TO BE SWORDN — PRIVILEGE.** — The refusal of a person called as a witness to comply with an order of the court directing him to be sworn in a case on trial is a contempt of court, and is not excused by the assertion of the witness as a reason for his refusal that his testimony would have a tendency to subject him to punishment for a felony. His privilege cannot be urged by the witness until a question is put to him after being sworn, the answer to which would have that tendency. Whether the answer would or might be of such a tendency is to be determined by the court, and it cannot be called upon to do so in advance of the question being put. — *Eas parte Stice*, 51.
3. **SEPARATE REFUSALS TO BE SWORDN — DISTINCT CONTEMPTS.** — The petitioner was called as a witness on the trial of a criminal prosecution, and refused to be sworn. For this he was adjudged guilty of contempt of court, and punished by imprisonment for one day. Upon the expiration of such imprisonment, he was again called as a witness in the same case, and again refused to be sworn. The court thereupon adjudged him guilty of contempt, and sentenced him to pay a fine, or in default thereof, to be imprisoned. Held, that each refusal to be sworn was a separate contempt, for which the court had jurisdiction to impose separate punishments. — *Id.*
4. **RE-ENTRY ON LAND AFTER DISPOSSESSION.** — Under section 1210 of the Code of Civil Procedure, a defendant in an action to recover the possession of land is guilty of contempt if he re-enters thereon after being dispossessed under the judgment rendered therein, notwithstanding the re-entry was made more than five years after the date of the judgment. — *Temple v. Superior Court of Los Angeles County*, 211.
5. **PROCEEDING TO PUNISH FOR — MANDAMUS TO COMPEL HEARING.** — A writ of mandamus lies to compel the Superior Court to hear and determine a proceeding for such a contempt where it refused to hear and has dismissed the proceeding for want of jurisdiction. — *Id.*

See **APPEAL**, 1.

CONTINUANCE.

CRIMINAL LAW — CONTINUANCE OF TRIAL — ABSENCE OF WITNESS — AFFIDAVITS MUST SHOW ISSUANCE OF SUBPOENA. — The refusal to continue the trial of a criminal case on the ground of the absence of a material witness for the defendant, who resides out of the county in which the trial is had, is not error, if the affidavits for continuance fail to show that a subpoena for the witness, having indorsed thereon an order of the trial judge for his attendance, was ever issued. — *People v. Lampson*, 204.

CONTRACT.

1. **BREACH OF — ACTION TO RECOVER FOR — PLEADING.** — In an action to recover damages for the breach of an alleged contract, the complaint is insufficient if it merely alleges a promise without averring its breach, or if it assigns a breach of something which is not alleged to have been promised. — *Du Burtz v. Jessup*, 75.
2. **CONTRACT FOR SALE OF LAND — REFUSAL TO EXECUTE AGREEMENT FOR SALE.** — The action was brought to recover damages for the breach of a contract whereby the plaintiffs agreed to procure a purchaser of certain land belonging to the defendant, at a fixed price, to be paid in installments at stated times, in consideration of which the defendant promised to pay them a certain compensation. The complaint, after setting forth the contract, alleged that the plaintiffs found an intended purchaser, and assigned as a breach of the contract the refusal of the defendant to join with the purchaser in the execution of an agreement for the sale of the land embodying the terms upon which the defendant had authorized the plaintiffs to negotiate the sale. *Held*, that the refusal of the defendant to execute the agreement was not a breach of the contract. — *Id.*
3. **CONTRACT FOR SERVICES — PAYMENT BY THE DAY.** — In an action to recover for services alleged to have been rendered for the defendant at an agreed price per day, the plaintiff is only entitled to recover for the length of time during which he was engaged in the services, at the price agreed upon. — *Lattemore v. Baldwin*, 40.
4. **BUILDING CONTRACT — FAILURE TO RECORD — LIABILITY OF OWNER.** — Under section 1183 of the Code of Civil Procedure as amended in 1885, a contractor for the erection of a building cannot maintain an action against the owner to recover damages for not being allowed to complete the building, if the contract was not filed for record as required by that section. — *Palmer v. White*, 220.
5. **AGREEMENT TO PAY COMMISSION — CONSIDERATION.** — Services to be rendered by a promisee in securing a loan for the promisor is a sufficient consideration to support a promise to pay a commission if the loan is obtained. — *Barley v. Buell*, 335.
6. **AGREEMENT TO FURNISH WATER — CONSTRUCTION.** — A certain agreement, stated in the opinion, whereby the assignors of the plaintiff contracted to furnish, deliver, and sell water to the defendant, construed with reference to the elevation at which the water should be delivered. — *Sierra Union Water and Mining Company v. Baker*, 572.
7. **AGREEMENT FOR SALE OF WATER CONSTRUED.** — An agreement, stated in the opinion, whereby the plaintiff was to furnish and the defendant to take, at a specified price, certain water, to be used in running a quartz-mill belonging to the latter, *held*, not to require the defendant to pay the stipulated price after he had parted with his ownership of the mill. — *Table Mountain and San Andreas Water Company v. Chavanne*, 616.
8. **SUBSCRIPTION TO CHARITABLE OBJECT — LIABILITY OF SUBSCRIBER — ACCEPTANCE OF OFFER — DEATH OF SUBSCRIBER.** — A promise to pay a subscription to help defray the expenses of some charitable object is a mere offer, which may be revoked at any time before it is accepted by the promisee; and an acceptance can only be shown

CONTRACT (Continued).

by some act by the promisee whereby a legal liability is incurred or money is expended on the faith of the promise. If the promisor die before his offer is accepted, it is thereby revoked, and cannot afterwards, by any acts showing an acceptance, be made enforceable against his estate. The rule is otherwise when subscribers agree together to make up a specified sum, and where the withdrawal of one increases the amount to be paid by the others. In such a case, as between the subscribers, there is a mutual liability, and the co-subscribers may maintain an action against one who refuses to pay. — *Grand Lodge of the Independent Order of Good Templars v. Farnham*, 158.

See CONSIDERATION; MARRIED WOMEN; MINES AND MINING, 4; PUBLIC LANDS, 9; PUBLIC POLICY; SPECIFIC PERFORMANCE, 1-3, 5; STATUTE OF FRAUDS, 1; VENDOR AND VENDEE.

CONVERSION. See DEMURRER, 1; FIXTURES, 2, 3; FRAUDULENT CONVEYANCE, 4; GROWING CROPS.

CORPORATIONS.

1. DEFECTIVE CERTIFICATE OF INCORPORATION — EVIDENCE. — A document purporting to be a certificate of incorporation, which is legally defective for want of conformity to the statutory requirements, is not proof of a corporation *in esse*. — *McCallion v. Hibernia Savings and Loan Society*, 163.
2. ACTION BY STOCKHOLDERS — REQUEST ON DIRECTORS TO BRING — MUST BE MADE IN GOOD FAITH. — The action was brought by certain stockholders of a corporation against the company, its president, directors, and other officers, for the purpose of procuring the appointment of a receiver of the corporate property, to compel each and all of the defendants to account to the company; that an assessment levied upon its capital stock be rescinded; and that the sale of the stock in payment of the assessment be enjoined. The complaint alleged that all of the individual defendants had conspired together and embezzled a large amount of the corporate funds. It further alleged that the plaintiffs had requested the directors of the corporation to bring the action in the name of the company, but that they had refused. On the trial, no evidence connecting the directors with any fraudulent act or embezzlement of the corporate property was introduced, and it appeared that the sole object of the action was to compel the defendants, other than the directors, to account to the company for certain corporate property alleged to have been fraudulently appropriated by them. Held, that the action could not be maintained by the stockholders, for the reason that the request made by them on the directors to bring the action was simulated, and did not express the real nature of the action that they desired to have brought. — *Bacon v. Irvine*, 222.

See ASSOCIATIONS; MORTGAGE, 3-5; MUNICIPAL CORPORATIONS; RAILROAD; TELEGRAPH COMPANY.

COSTS.

INJUNCTION SUIT. — In an injunction suit, where a perpetual injunction is awarded, the allowance of costs to the plaintiff is within the discretion of the court. — *Davidson v. Devine*, 519.

CO-TENANCY. See **TENANTS IN COMMON.**

COUNSEL FEES. See **HUSBAND AND WIFE**, 5, 6; **MORTGAGE**, 5.

COUNTY TREASURER. See **COMMON CARRIER**, 4, 5.

COUNTERCLAIM.

PLEADING — ACTION AGAINST JOINT DEBTORS — CAUSE OF ACTION IN FAVOR OF ONE DEFENDANT. — In an action against two or more joint debtors to enforce their joint liability, the summons being served on all of them, one of the defendants cannot set up by way of counterclaim a cause of action existing in his favor alone against the plaintiff. — *Roberts v. Donovan*, 108.

See **LEASE**, 5.

COVENANTS. See **LEASE.**

COVERTURE. See **PLEADINGS**, 2.

CRIMINAL LAW.

1. **ONCE IN JEOPARDY.** — If a party is once placed upon trial before a competent court and jury upon a valid indictment, the jeopardy attaches, to which he cannot be again subjected, unless the jury be discharged from rendering a verdict by a legal necessity, or by his consent; or in case a verdict is rendered, if it be set aside at his instance. — *People v. Horn*, 17.
2. **APPEAL BY PEOPLE — INSTRUCTION TO ACQUIT.** — If through misdirection of the judge in matter of law a verdict is improperly rendered, it can never afterward on application of the prosecution in any form of proceeding be set aside; and where the court instructs the jury to acquit the defendant, and the jury retires, and returns into court and renders a verdict of not guilty, the order directing the jury to acquit will not be disturbed by the appellate court, notwithstanding the trial court is only authorized to "advise" the jury to acquit. — *Id.*
3. **ASSAULT WITH DEADLY WEAPON — CONDITION OF DEFENDANT AS TO SOBRIETY — EVIDENCE — INTENT.** — Where an information charges the defendant with an assault with intent to murder, and he is convicted of an assault with a deadly weapon, the exclusion of evidence tending to show his condition as to sobriety or the contrary at the time of the assault is not error, as the offense of which the defendant was convicted does not involve the necessity of proof of any specific intent to commit it. — *People v. Marseiler*, 98.

CRIMINAL LAW (Continued).

4. ASSAULT WITH DEADLY WEAPON — PUNISHMENT OF — CONSTITUTIONAL LAW.—The punishment for an assault with a deadly weapon provided for by section 245 of the Penal Code is not excessive, cruel, or unusual within the meaning of section 6 of article 1 of the constitution. — *Ea parte Mitchell*, 1.
5. SUFFICIENCY OF VERDICT — JUDGMENT — IMPRISONMENT IN STATE PRISON.—*People v. Turner*, 65 Cal. 540, affirmed as to the point that where a party is informed against for an assault with intent to commit murder, and a verdict is rendered against him for an assault with a deadly weapon, the verdict is sufficient to support a judgment of imprisonment for two years in the state prison, without stating that the assault was made with the intent to commit great bodily harm. — *Id.*
6. IMPRISONMENT AS MEANS OF ENFORCING FINE.—The petitioner was convicted of an assault with a deadly weapon, and sentenced to imprisonment in the state prison for two years, and to pay a fine, and to be imprisoned in the same prison one day for every dollar of the fine. *Held*, that conceding the portion of the judgment providing for imprisonment as a means of enforcing the fine was invalid, the sentence of imprisonment as a punishment was valid, and should be enforced. — *Id.*
7. ASSAULT WITH DEADLY WEAPON WITH INTENT TO MURDER — CONVICTION FOR LESSER OFFENSE — INSTRUCTION.—In a prosecution for an assault with a deadly weapon with intent to murder, the omission of the court to instruct the jury as to its power to convict for a lesser crime necessarily included in the charge is not error, if the evidence would not warrant a conviction for the lesser crime, or if a request for such an instruction was not made by the defendant. — *People v. Franklin*, 641.
8. EVIDENCE OF DRUNKENNESS — ADMISSIBILITY OF — MUST BE RECEIVED WITH CAUTION.—In such a case, evidence of the drunkenness of the defendant must be received by the jury with great caution, and can be considered by them only for the purpose of determining the degree of the crime by showing that his mental condition at the time of the assault incapacitated him from deliberately forming an intention to murder; but it cannot be considered in determining whether he committed an assault with a deadly weapon with intent to inflict great bodily harm. — *Id.*
9. DEADLY WEAPON DEFINED.—A deadly weapon is one likely to produce great bodily harm. A knife may be such a weapon. — *Id.*
10. ASSAULT WITH INTENT TO MURDER—INFORMATION.—An information for an assault with intent to murder is sufficient if it substantially complies with the requirements of sections 950-952 of the Penal Code. — *People v. Marseiler*, 98.
11. VIEW OF LOCUS IN QUO — CANNOT BE MADE IN ABSENCE OF DEFENDANT — CONSTITUTIONAL LAW.—In a criminal prosecution, the defendant is deprived of his constitutional right of appearing and defending in person, and of being confronted with the witnesses against him, if the jury, under the direction of the court, view the *locus in quo* without the presence of the defendant. — *People v. Lourey*, 193.

CRIMINAL LAW (Continued).

12. **BURGLARY — POSSESSION OF STOLEN ARTICLES — EVIDENCE.** — On a trial for burglary, evidence is admissible that articles in the house burglarized on the night of the burglary were found in the possession of the defendant on the following morning several miles from the place where the crime was committed. — *Id.*
13. **FORGERY — INSTRUCTIONS.** — In a prosecution for uttering and passing a forged promissory note, certain instructions quoted in the opinion, *held*, not misleading or calculated to confuse the jury. — *People v. Phillips*, 161.
14. **VARIANCE BETWEEN INSTRUMENT AS RECITED AND PROVED.** — In such a prosecution, where the information purports to set forth the instrument alleged to have been forged *in hoc verba*, and a word found in the instrument proved is omitted from the instrument as recited, or a word inserted in the instrument as recited is not in the instrument proved, the variance is immaterial if the change in no manner or for any purpose alters the signification. — *Id.*
15. **IMMATERIAL VARIANCE.** — The information alleged the forgery of a promissory note, described as payable "to H. C. Phillips, or order." The note given in evidence did not contain the word "to" immediately before the words "H. C. Phillips, or order." *Held*, that the variance was immaterial. — *Id.*
16. **EVIDENCE OF SUBSEQUENT TRANSACTIONS — INTENT.** — Evidence of transactions had between the defendant and the person alleged to have been defrauded, after the delivery of the note, is admissible, if it tends to show that the note was used with a fraudulent intent, and to secure a valuable benefit from the person to whom it was delivered. — *Id.*
17. **GAMING AT TAN — CARRYING ON GAME — INFORMATION.** — Under section 330 of the Penal Code, an information for carrying on and conducting a game of tan need not allege that the defendant did so as an owner or employee, nor is evidence to that effect necessary to sustain a conviction of the offense. — *People v. Sam Lung*, 515.
18. **ARTICLES USED AT GAME — EVIDENCE — RES GESTÆ.** — The articles used in carrying on and conducting the game are part of the *res gestæ*, and admissible in evidence in illustration of the nature of the game. — *Id.*
19. **IDENTIFICATION OF GAME.** — On the trial, a witness described the game which he saw the defendant conducting. Another witness thereupon testified that the game described was tan. *Held*, that the evidence was admissible. — *Id.*
20. **JUDGMENT — RECITAL OF OFFENSE.** — A recital in the judgment that the defendant was found guilty of the offense of gaming at tan as charged in the information is equivalent to a recital that the defendant was found guilty of gaming at tan by carrying on and conducting the same for money or its equivalent. — *Id.*
21. **EXCLUSION OF WITNESSES FROM COURT-ROOM.** — The exclusion of witnesses from the court-room is within the discretion of the court. — *Id.*
22. **GRAND LARCENY — ERRONEOUS INSTRUCTION.** — In a prosecution for grand larceny, an instruction, quoted in the opinion, to the effect that the jury might find the defendant guilty, although they might

CRIMINAL LAW (Continued).

not be entirely satisfied that he, and no other person, committed the alleged offense, *held*, erroneous. — *People v. Carrillo*, 643.

23. GRAND LARCENY — VERDICT. — In a prosecution for grand larceny, a verdict finding the defendant "guilty as charged" is sufficient. — *People v. Manners*, 428.

24. MURDER — EVIDENCE OF IMMORAL CHARACTER OF DEFENDANT — IMMATERIAL ERROR. — In a prosecution for murder, the admission of evidence tending to show that the defendant was a person of immoral character is without prejudice, if the defendant when a witness in his own behalf testifies substantially to the same effect. — *People v. Daniels*, 521.

25. JUSTIFIABLE HOMICIDE — INSTRUCTION. — In such a case, an instruction that in order to justify the homicide, the defendant, if he was the assailant in the combat during which the killing occurred, or if he was engaged in mortal combat, must in good faith have endeavored to retire from the struggle before the homicide was committed, is substantially in the language of section 197, subdivision 3, of the Penal Code, and therefore not erroneous. — *Id.*

26. INSTRUCTIONS. — The refusal to give certain instructions stated in the opinion, *held*, not erroneous. — *Id.*

27. MURDER — PRONOUNCING JUDGMENT — PRELIMINARY REQUIREMENTS. — The defendant was convicted of murder in the first degree. When he appeared for judgment, the court informed him of the information presented against him for the crime of murder, of his arraignment and plea of not guilty, of his trial and the verdict finding him guilty of murder in the first degree. He was then asked whether he had any legal cause to show why judgment should not be pronounced against him, and having replied in the negative, was sentenced to be hanged. *Held*, that the requirements of section 1200 of the Penal Code were sufficiently complied with. — *People v. Jung Qung Sing*, 469.

28. PRESENCE OF DEFENDANT UPON RETURN OF VERDICT — RECORD WHEN SUFFICIENTLY SHOWS. — The record in a prosecution for felony sufficiently shows that the defendant was present in court when the verdict against him was received, if it recites that the parties and their attorneys were present at every stage of the proceedings, and that upon the discharge of the jury the defendant was remanded to the custody of the sheriff. — *Id.*

29. OBTAINING PROPERTY UNDER FALSE PRETENSES — DESCRIPTION OF PROPERTY — VARIANCE. — An indictment for obtaining under false pretenses a promissory note alleged to have been executed by the person defrauded is not sustained by evidence showing that the note was jointly executed by him and another. — *People v. Reed*, 529.

30. PROMISSORY NOTE — PERSONAL PROPERTY. — Under section 7 of the Penal Code, a promissory note is personal property, and may be the subject of the offense of obtaining property under false pretenses. — *Id.*

31. OBTAINING PROPERTY UNDER FALSE PRETENSES — INFORMATION. — An information for obtaining money under false pretenses is sufficient if it charges the offense substantially in the language of the Penal Code defining it. — *People v. Donaldson*, 116.

CRIMINAL LAW (Continued).

32. **BANK CHECK — FALSE TOKEN — WANT OF FUNDS TO MEET CHECK.** — In a prosecution for obtaining property under false pretenses, a bank check drawn by the defendant in favor of the person alleged to have been defrauded, and in payment of the property obtained, is a false token within the meaning of section 1110 of the Penal Code, if the defendant knew when he gave the check that he had neither funds to meet it nor credit at the bank upon which it was drawn. — *Id.*

33. **EVIDENCE — INSTRUCTION.** — Where the evidence discloses that the property was obtained through the instrumentality of such a false token, the refusal to instruct the jury to acquit unless they found that the defendant told the owner of the property that he had the money in bank, and that the owner was induced to part with the property by reason of that representation, is not error. — *Id.*

34. **DELIVERY OF PROPERTY — VESTING OF TITLE — QUESTION FOR JURY — CONFLICT OF EVIDENCE.** — In such a case, the question whether or not the property was delivered and title thereto vested in the defendant before the giving of the check is for the jury, and its finding thereon will not be disturbed when the evidence is conflicting. — *Id.*

35. **RAPE — INFORMATION — ALLEGATION OF RESISTANCE.** — An allegation in an information for rape that the act was committed by force and violence, and against the will and consent of the female, is equivalent to a statement that she resisted, but that her resistance was overcome by violence, or that she was prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution; and under such an allegation, evidence that she resisted or was prevented from resisting is admissible. — *People v. Pacheco*, 473.

36. **RAPE — ASSAULT WITH INTENT TO COMMIT — GIRL UNDER TEN YEARS OF AGE — CONSENT.** — A conviction of an assault with intent to commit rape upon a girl under ten years of age may be had without showing her want of consent to the assault. — *People v. Gordon*, 467.

37. **PRESUMPTION AGAINST CONSENT.** — A girl under ten years of age is presumed incapable of consenting to an act of sexual intercourse, or to an assault with intent to commit it. — *Id.*

38. **REFUSAL TO PAY OVER PUBLIC MONEY — INDICTMENT.** — The indictment charged in effect that the defendant was the tax collector of Del Norte County from the first Monday in January, 1883, at 12 o'clock, m., to the like day and time on the fifth day of January, 1885; that as tax collector he had on the fifth day of January, 1885, received and collected certain public money, and on that day, and for five days thereafter, and ever since then, had wholly and willfully refused and omitted to pay it over to the county treasurer. *Held*, that the indictment charged but one offense, and was sufficient under section 424 of the Penal Code. — *People v. Otto*, 523.

39. **ROBBERY — CIRCUMSTANTIAL EVIDENCE — FOOTPRINTS.** — The defendants were convicted on circumstantial evidence only of the crime of robbery. On the trial, the prosecution, as tending to show that the defendants were present at the robbery, and were the persons who committed it, gave evidence that certain boot-marks of peculiar characteristics were found the day after the

CRIMINAL LAW (Continued).

robbery at the place, and were traced from that point along a trail to the residence of one of the defendants. The defendants thereupon offered to prove that on the third day after the robbery, at a place within three days' travel from the place of its commission, two men other than the defendants, but of similar appearance, were seen, and that a boot worn by one of them left marks similar to those found on the trail. The court excluded the evidence. *Held*, that the ruling of the court was erroneous.—*People v. Myers*, 582.

See **APPEAL**, 7; **BAIL**; **CONTEMPT**, 2, 3; **CONTINUANCE**; **EVIDENCE**, 1, 2, 14-24; **INSTRUCTIONS**, 6; **LOTTERY TICKET**.

CROSS-COMPLAINT. See **INJUNCTION**, 5.

DAMAGES. See **DEDICATION**, 6; **JUDGMENT**, 4; **LEASE**, 4, 5; **MALICIOUS PROSECUTION**; **NUISANCE**.

DEADLY WEAPON. See **CRIMINAL LAW**, 3-9.

DEBTOR AND CREDITOR. See **ASSIGNMENT FOR BENEFIT OF CREDITORS**; **COUNTERCLAIM**; **EXECUTION**; **FIXTURES**, 1; **FRAUDULENT CONVEYANCE**; **HOMESTEAD**, 4; **MARRIED WOMEN**; **STATUTE OF LIMITATIONS**, 1.

DECREE. See **JUDGMENT**.

DEDICATION.

1. **FILING AND RECORDING MAP—ACCEPTANCE BY PUBLIC.**—The filing and recording of a map of a tract of land, certain portions of which are delineated thereon as public streets, is a mere offer of dedication to the public of the streets, which does not become effectual as an irrevocable dedication until its acceptance by the public. Such an acceptance is ordinarily made manifest by a use on the part of the public for such a length of time as will be sufficient to evince its acceptance of the dedication as intended to be made.—*Haycard v. Manzer*, 476.

2. **DEDICATION OF STREET—NON-ACCEPTANCE FOR TWENTY YEARS.**—The owner of a tract of land caused a map thereof to be made and recorded, on which the *locus in quo* was delineated as a public street. About one year afterwards, he conveyed a portion of the land, including the *locus in quo*, to the plaintiff, who immediately entered into the exclusive possession thereof, and so remained for a period of twenty years, claiming the same adversely to the whole world. During this time, the *locus in quo* had never been accepted or used by the public as a street. *Held*, that the land had never been dedicated as a public street.—*Id.*

3. **PUBLIC HIGHWAY—CONCLUSION OF FACT—INTENTION.**—The dedication of a road as a public highway is a conclusion of fact to be drawn from all the circumstances of each particular case, and cannot be presumed without evidence of an unequivocal intention on the part of the owner to make the dedication.—*Quinn v. Anderson*, 454.

DEDICATION (Continued).

4. ERECTION OF GATES OVER ROAD.—The erection and maintenance of gates or other obstructions over a road is strong evidence in support of a mere license to the public to pass over it, and in rebuttal of its dedication to public use.—*Id.*
5. EVIDENCE OF DEDICATION.—Stronger evidence is required to establish the dedication of a neighborhood or timber road than of a thoroughfare, and in case of a county road than of a street in a town or city.—*Id.*
6. ACTION TO ENJOIN OBSTRUCTIONS—DAMAGES—FINDINGS—IMMATERIAL ISSUE.—In an action to enjoin the obstruction by the defendants of an alleged public highway over their land, and to recover damages for past obstructions, the issue raised as to the damages is immaterial, and no finding thereon is necessary if the court finds that the *locus in quo* belongs to the defendants, and never was a public highway.—*Id.*

DEED. See AGENCY, 8, 9; BOUNDARIES, 3; EVIDENCE, 12; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE, 1; MARRIED WOMEN; MORTGAGE, 1, 2; TAX DEED; TENANTS IN COMMON; TRUST, 4, 10.

DEFAULT. See AFFIDAVIT OF MERITS.

DELAY. See FRAUDULENT CONVEYANCE, 5.

DELIVERY. See CRIMINAL LAW, 34; EVIDENCE, 13; FRAUDULENT CONVEYANCE, 3.

DEMAND. See BILL OF PARTICULARS; CORPORATIONS, 2; FIXTURES, 3; LANDLORD AND TENANT; STREET ASSESSMENT, 6.

DEMURRER.

1. CONVERSION—INSUFFICIENT DESCRIPTION OF PROPERTY.—In an action to recover damages for the conversion of certain personal property, an objection to the complaint that it does not describe the property alleged to have been converted with sufficient particularity must be taken by special demurrer.—*Kelly v. Murphy*, 560.
2. PLEADING—DEFECT OF PARTIES—ANSWER—IMMATERIAL ERROR.—Where a demurrer to a separate defense in an answer setting up a defect of parties plaintiff is erroneously overruled, the error is without prejudice to the plaintiffs if the defendants subsequently abandon the defense.—*Burroughs v. De Couts*, 362.

See AMENDMENTS, 2; MINERS' LIEN, 1; NUISANCE, 3.

DEPOSITION. See EVIDENCE, 24, 26, 27.

DESCRIPTION. See BOUNDARIES, 2, 3; CRIMINAL LAW, 29; DEMURRER, 1; STREET ASSESSMENT, 4.

DILIGENCE. See NEW TRIAL, 3; REFERENCE.

DIRECTORS. See CORPORATIONS, 2.

DISCONTINUANCE. See AMENDMENTS, 3.

DISCRETION. See AMENDMENTS, 5; COSTS; CRIMINAL LAW, 21; EVIDENCE, 16; FINDINGS, 10; HUSBAND AND WIFE, 5.

DISMISSAL. See APPEAL, 3, 5, 7; REFERENCE; SUMMONS, 6.

DISSOLUTION. See PARTNERSHIP, 4.

DISTRIBUTION. See ESTATE OF DECEDEDENT, 13.

DIVORCE. See APPEAL, 4, 5; FALSE REPRESENTATIONS, 1.

DRAFT. See MINER'S LIEN, 2.

DRUNKENNESS. See CRIMINAL LAW, 3, 8.

DYING DECLARATIONS. See EVIDENCE, 17-19.

EJECTMENT.

1. COMMON SOURCE OF TITLE — EVIDENCE OF PRIOR TITLE.— In an action of ejectment, where both parties claim to derive title from the same source, the plaintiff need not introduce in evidence any conveyance from the former owner to the person having the common source of title. — *Frink v. Roe*, 296.
2. GENERAL VERDICT — CONFLICT OF EVIDENCE.— In an action of ejectment, a general verdict is sufficient, and will not be disturbed on the ground of the insufficiency of the evidence, if the evidence is substantially conflicting. — *Joy v. McKay*, 445.

See BOUNDARIES, 2; FRAUDULENT CONVEYANCE, 2; INJUNCTION, 4; LANDLORD AND TENANT, 11; TRUST, 10.

ELECTION. See ESTATE OF DECEDEDENT, 20; MUNICIPAL CORPORATIONS, 1; TRUST, 12.

EMPLOYER AND EMPLOYEE.

1. DEFECTIVE MACHINERY — LIABILITY OF MILL-OWNER.— It is the duty of the owner of a saw-mill to furnish suitable and safe machinery for the use of his employees, and he cannot divest himself of liability for injuries to an employee, caused by defective machinery, by intrusting the performance of that duty to his servants. — *Sanborn v. Madera Flume and Trading Company*, 261.
2. KNOWLEDGE BY EMPLOYEE OF DEFECTS.— The owner of the mill is not liable for such injuries to an employee if the latter knew or had the means of knowledge of the defects in the machinery, and of the dangers and risks likely to result from its use. — *Id.*

EMPLOYER AND EMPLOYEE (Continued).

3. DANGER OF EMPLOYMENT — INSTRUCTION. — The action was brought by an employee in a saw-mill against his employer, to recover damages for injuries alleged to have been caused by defective machinery. The defendant requested the court to instruct the jury that "when a party works with or in the vicinity of a piece of machinery insufficient for the purpose for which it is employed, or for any reason unsafe, with a knowledge or means of knowledge of its condition, he takes the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries sustained arising out of accidents resulting from such defective condition of the machinery." *Held*, that the instruction was properly refused, as it failed to include as one of the conditions upon which the plaintiff could not maintain the action that he knew or might have known that his employment involved danger to himself. — *Id.*
4. NEGLIGENCE OF EMPLOYEE — QUESTION FOR JURY. — In such an action, the question whether the plaintiff was negligent or not is one of fact for the jury, and the knowledge of the plaintiff of the defectiveness of the machinery is only one of the probative facts from which the ultimate fact of negligence must be determined. — *Id.*
5. EXPERT IN SAW-MILLS — EVIDENCE. — On the trial, a witness for the plaintiff testified in rebuttal, after showing himself qualified as an expert, that at the time of the accident the log being sawed did not pinch the saws, and that the machinery was being operated in the usual manner. *Held*, that the evidence was proper. — *Id.*

See NEGLIGENCE.

ENCUMBRANCE. See ATTACHMENT.

EQUITY. See FORFEITURE; FRAUDULENT CONVEYANCE, 6, 7; INJUNCTION; SPECIFIC PERFORMANCE; TRUST.

ESCHEATED ESTATE. See ESTATE OF DECEDENT, 5.

ESTATE OF DECEDENT.

1. NON-RESIDENT FOREIGNERS — RIGHTS OF SUCCESSION — CONSTITUTIONAL LAW. — The constitution does not prohibit the legislature from conferring upon non-resident foreigners the same rights with respect to the acquisition, possession, enjoyment, transmission, and inheritance of property as are guaranteed by that instrument to resident foreigners. — *State of California v. Smith*, 153.
2. SECTION 671 OF CIVIL CODE. — The legislature had power to provide, by section 671 of the Civil Code, for the succession to property by foreigners who have never been residents. That section provides a rule with respect to property within the state, and confers a right to be enjoyed within its jurisdiction. — *Id.*
3. NON-RESIDENT ALIENS — WHO ARE. — The words "non-resident aliens," as used in section 672 of the Civil Code, mean those persons who are neither citizens of the United States nor residents of the state. — *Id.*

ESTATE OF DECEDENT (Continued).

4. APPEARING AND CLAIMING PROPERTY — LIMITATION ON RIGHT. — Under that section, the failure of a non-resident alien to appear and claim the property within five years after descent cast operates a bar of his right to assert any title in the property as against the state. But any appearance within the state, and the assertion of a claim to the property, either by action, or by taking possession of or conveying or contracting with respect to it, within the time limited, is sufficient to render the bar of the statute inoperative. — *Id.*
5. PROCEEDING BY STATE TO VEST TITLE — WHEN SHOULD BE BROUGHT. — A proceeding brought by the attorney-general to vest title in the state as to property alleged to have escheated to it under section 672 of the Civil Code is premature if commenced within five years after the death of the ancestor. — *Id.*
6. PROBATE OF WILL — PETITION — ESSENTIAL averMENTS. — Under section 1300 of the Code of Civil Procedure, it is not essential that the petition for the probate of a will should state whether it is an olographic or other species of will, nor does any defect of form or in the statement of the jurisdictional facts actually existing invalidate the probate. — *Estate of Learned*, 140.
7. CONTEST OF PROBATE — FINDINGS — OLOGRAPHIC WILL. — Where the probate of a will is contested, and the court by whom the contest is tried finds against the contestants on all the issues raised by them, a further finding that the will is valid as an olographic will, although not necessary to sustain the judgment admitting it to probate as such, is not erroneous, notwithstanding no issue as to its validity as an olographic will was raised by the contest. — *Id.*
8. OLOGRAPHIC WILL — EXECUTION BEFORE ADOPTION OF CIVIL CODE — VALIDITY OF. — An olographic will is not invalid because made and executed prior to the time section 1277 of the Civil Code became operative, if the testator did not die until after the section took effect. — *Id.*
9. APPOINTMENT OF SPECIAL ADMINISTRATOR — PRIOR APPOINTMENT OF EXECUTRIX — SUSPENSION AND REMOVAL. — Where letters testamentary have been issued to an executrix, the superior court has no power afterwards to appoint a special administrator of the estate, unless the executrix is first suspended or removed. — *Schroeder v. Superior Court of San Mateo County*, 343.
10. EXECUTRIX NOT REMOVED BY APPOINTMENT OF SPECIAL ADMINISTRATOR. — An *ex parte* order appointing a special administrator does not operate as a removal of an executrix previously appointed. — *Id.*
11. MARRIAGE OF EXECUTRIX — EFFECT OF. — Under section 1352 of the Code of Civil Procedure, the marriage of an executrix does not *eo instanti* deprive her of the power to act. It merely renders her incompetent, so that she may be proceeded against for suspension and removal as provided by the code. — *Id.*
12. REVOCATION OF PROBATE — DISMISSAL OF PETITION — APPEAL. — No appeal lies from an order dismissing a petition for the revocation of the probate of a will, or from an order denying a motion of the contestant to set aside and vacate such previous order and

ESTATE OF DECEDEDENT (Continued).

all orders and decrees made subsequent thereto. — *Estate of Sbarboro*, 147.

13. NOTICE OF HEARING FOR DISTRIBUTION — SUFFICIENCY OF. — The decree of distribution in question was objected to on the ground that the notice required by section 1633 of the Code of Civil Procedure had been improperly given. The notice was in due form, signed by the clerk of the proper court, and posted according to law, and an affidavit of posting made by a qualified person. There was no evidence in the record that the person making the affidavit did not act for the clerk, or that the notice did not remain where posted for the required time. The giving of a proper notice was recited in the decree. *Held*, that the objection could not be sustained. — *Id.*

14. ORDER SETTLING ACCOUNT AND DISCHARGING EXECUTOR — SETTING ASIDE. — After the expiration of the time limited by section 473 of the Code of Civil Procedure, a decree settling the final account of an executor and discharging him from his trust, if regular upon its face, cannot be set aside by the Probate Court on the ground that it had been inadvertently and prematurely entered. The remedy in such a case is in equity. — *Estate of Cahalan*, 804.

15. COMMISSIONS OF EXECUTOR — LAND NOT BELONGING TO ESTATE. — The executors of the last will of a deceased person are not entitled to commissions upon the value of a piece of land of which they had taken possession, and which was included in their inventory as a part of the property of the estate, where it is afterwards determined, in an action brought against them to recover the possession, that the land did not belong to the estate. — *Estate of Kicaud*, 69.

16. CLAIM AGAINST BEARS INTEREST AFTER SETTLEMENT OF ACCOUNT. — A claim against the estate of a deceased person, which has been passed upon on the settlement of the final account of the administrator, and ordered to be paid in due course of administration, has the effect of a judgment against the estate, and bears interest at the rate of seven per cent per annum from the date of the decree settling the account, although the demand on which the claim was founded did not bear interest. — *Estate of Olvera*, 184.

17. SPECIFIC PERFORMANCE — CONTRACT FOR SALE OF LAND — JUDGMENT AGAINST EXECUTOR AFTER RESIGNATION — HEIRS NOT BOUND. — Where an action for the specific performance of a contract for the sale of land is brought against a defendant as the executor of the will of the deceased vendor after the resignation of his executorship has been accepted by the Probate Court, and without joining the heirs of the deceased, a judgment rendered therein against him as executor does not bind the heirs. — *Luo v. Commercial Bank of San Diego*, 339.

18. ORDER ACCEPTING RESIGNATION OF EXECUTOR — PRESUMPTION OF REGULARITY. — An order of the Probate Court accepting the resignation of an executor and discharging him from his trust is presumed to be regular, and cannot be collaterally attacked. — *Id.*

19. SERVICES OF MARRIED WOMAN — CLAIM FOR — PRESENTATION OF JUDGMENT. — A claim against the estate of a deceased person for services rendered by a married woman while living with her hus-

ESTATE OF DECEDENT (Continued).

band is community property, and should be presented to the personal representatives of the decedent in the name of the husband. But where such a claim, verified by the wife, is presented in her name by the husband, and is rejected, and an action is subsequently brought thereon by the husband and wife, a judgment in favor of the plaintiffs will not be reversed on account of the informality in the manner of the presentation. — *Smith v. Furnish*, 424.

20. BEQUEST IN PAYMENT OF SERVICES — RENUNCIATION OF BY LEGATEE — ELECTION. — The action was brought to recover the value of services rendered by one of the plaintiffs as nurse to a deceased person. The decedent by his will bequeathed to the plaintiff a sum of money in consideration and in payment for the care and attention of the plaintiff during his last sickness. *Held*, that the action was a renunciation of the bequest, and an election by the plaintiff not to rely upon it as a payment for the services. — *Id.*

See **APPEAL**, 2; **ESTOPPEL**; **EXECUTORS AND ADMINISTRATORS**; **PARTIES**.

ESTOPPEL.

DECREE OF PARTITION — PROBATE COURT — TITLE FROM DECEDENT. — Where a decree of partition of certain land, alleged to form part of the estate of a decedent, is rendered by the probate court, a party thereto is estopped from afterwards asserting any other title derived from the decedent adverse to that of his co-tenants under the decree. — *Burroughs v. De Couts*, 362.

See **EVIDENCE**, 24; **TENANTS IN COMMON**, 3; **WATER AND WATER RIGHTS**, 1.

EViction. See **LEASE**, 2-3.**EVIDENCE.**

1. **DEFENDANT IN DIFFERENT INFORMATION MAY BE CALLED.** — A party proceeded against in one information for an alleged murder may be called as a witness on behalf of the state to testify against a defendant charged in another and different information with the same killing. In such a case, the party called as a witness retains the right to object to answering a question which would tend to criminate him. — *Ex parte Stice*, 51.
2. **EVIDENCE FAVORABLE TO DEFENDANT.** — A defendant cannot object to the introduction of evidence if its only effect was favorable to him. — *People v. Donaldson*, 116.
3. **CONFLICT OF — VERDICT.** — Where the evidence is conflicting, a verdict will not be disturbed on the ground that it is not justified thereby. — *Anderson v. Black*, 236.
4. **EVIDENCE TENDING TO SHOW ILL WILL OF WITNESS — REJECTION OF WHEN NOT ERROR.** — On the trial, one of the plaintiffs, when testifying as a witness in his own behalf, was asked on cross-examination if he had not on a certain night gone with shot-guns upon the premises in controversy, while the defendants were in the peaceable possession thereof, and forcibly dispossessed them. The

EVIDENCE (Continued).

court disallowed the question. *Held*, that the question was proper as tending to show that the witness was biased or entertained ill will against the defendants, but that its rejection was without prejudice, as the witness had previously admitted entertaining ill will towards one of the defendants. — *Id.*

5. **HEARSAY EVIDENCE — IMMATERIAL ERROR.** — The admission in evidence of a statement by the person alleged to have been assaulted, made without the presence of the defendant and about two hours after the assault, to the effect that he was shot, without indicating by whom the shot was fired, is not prejudicial to the defendant if the latter admits when testifying in his own behalf to having fired the shot complained of. — *People v. Marseiler*, 98.

6. Error in admitting hearsay evidence of a certain fact is cured if the defendant subsequently testifies to the same effect. — *Id.*

7. **REPUTATION OF DEFENDANT FOR PEACE AND QUIET — REJECTION OF EVIDENCE OF.** — On the trial, the defendant's counsel asked a witness if he knew the reputation of the defendant for peace and quietude in the community in which he lived. The district attorney objected to the question because it had not been shown that the witness knew the particular community in which the defendant lived. The court thereupon asked the witness several questions, and then sustained the objection. The record does not show what these questions were, nor whether the witness knew in what community the defendant lived. *Held*, that the objection was properly sustained. — *Id.*

8. **IMPROPER QUESTION — ANSWER — ERROR WITHOUT PREJUDICE.** — The allowance of an improper question to be put to a witness against the objection of the defendant will be considered as without prejudice if the record fails to show that any answer was given to the question. — *Id.*

9. **EXPERT TESTIMONY AS TO EYESIGHT.** — A physician cannot testify as an expert to the relative powers of eyesight of two different persons, under certain named conditions, unless it is first shown that he has made an examination of their eyes. — *Id.*

10. **ABSENCE OF WITNESS FROM TRIAL — REFUSAL OF BENCH-WARRANT.** — On the trial, certain witnesses for the defendant, who had been served with subpoenas out of the county in which the action was tried, did not appear when called to testify. The defendant thereupon asked for a bench-warrant to enforce their appearance. The court denied the application. It did not appear by affidavit or other sworn statement what was sought to be proved by the witnesses, or that their testimony would have been material to the defendant, or that they were within immediate reach of the process of the court. *Held*, that the action of the court was proper. — *Id.*

11. **PUBLIC RECORDS.** — The books of a recorder's office are not admissible in evidence to prove the execution and contents of instruments which have been duly recorded, unless the absence of the originals is first explained or accounted for. — *Brown v. Griffith*, 14.

12. **DEED — RECORD — EVIDENCE OF EXECUTION AND DELIVERY.** — Conceding that the record of a deed which is introduced in evidence

EVIDENCE (Continued).

without objection is *prima facie* evidence of the genuineness, due execution, and delivery of the original, still it is only *prima facie* evidence of those facts, and may be rebutted.—*Burroughs v. De Couts*, 362.

13. **FINDING — DELIVERY.**—A finding that certain deeds under which the plaintiffs claim were never delivered, *held*, supported by the evidence.—*Id.*

14. **CRIMINAL LAW — INTERPRETER MAY BE WITNESS.**—A person appointed to act as an interpreter on the trial of a criminal action is not disqualified by reason of the fact that he was a witness for the prosecution.—*People v. Fong Ah Sing*, 8.

15. **EVIDENCE — QUESTION.**—On the examination of a witness, counsel cannot insert in a question a statement as having been made by the witness which had not in fact been made by him.—*Id.*

16. **LEADING QUESTION — DISCRETION.**—It is within the discretion of the trial court to allow leading questions to be put to a witness on his examination in chief.—*Id.*

17. **MURDER — DYING DECLARATIONS — WRITTEN STATEMENT — PAROL EVIDENCE.**—In a prosecution for murder, where dying declarations of the deceased have been reduced to writing, parol evidence is admissible to show the condition of deceased when the declarations were made. Such evidence does not add to or contradict the written statement.—*Id.*

18. **ENTIRE CONTEXT OF DECLARATION MUST BE GIVEN.**—A statement in a dying declaration disconnected from the context, and contradictory to the general import thereof, is inadmissible in evidence unless the whole of the context is given.—*Id.*

19. **ADMISSIBILITY OF DYING DECLARATIONS.**—Dying declarations to be admissible must relate to the act of killing or to the circumstances immediately attending it and forming part of the *res gestæ*.—*Id.*

20. **EVIDENCE — IMMATERIAL ERROR.**—The refusal of the court to permit a proper question to be answered is not a material error if the witness in another portion of his testimony fully answers the question.—*Id.*

21. **IMPEACHMENT OF WITNESS — EVIDENCE OF HOSTILITY.**—On a trial for murder, where the defendant is proved to have been previously arrested and charged with arson, a question as to who instigated the arrest is inadmissible in the absence of evidence or the offer of evidence connecting any witness for the prosecution with the arrest.—*Id.*

22. **IMPEACHED WITNESS — DISREGARDING TESTIMONY.**—The evidence of a witness who has been impeached may be disregarded by the jury, and the court may so instruct.—*People v. Phillips*, 61.

23. **CRIMINAL LAW — IMPEACHMENT OF WITNESS — CROSS-EXAMINATION — MATTERS COLLATERAL TO ISSUE.**—On the trial of a criminal case, where a witness for the defendant, after he had been examined and cross-examined, is recalled by the prosecution for further cross-examination, in order to lay a foundation for his impeachment, the answers of the witness given on his further cross-examination, concerning matters collateral to the issues, are binding on the prosecution, and as to them he cannot be contradicted.—*People v. Webb*, 120.

EVIDENCE (Continued).

24. **DEPOSITION — STIPULATION FOR — WITNESS OUT OF STATE — ESTOPPEL.** — Where the parties stipulate that the deposition of a witness out of the state may be taken by a designated person, and when taken may be used on the trial, they are afterwards estopped from objecting that the deposition was not taken under a commission issued by the trial court. — *Palmer v. Uncas Mining Co.*, 614; *Holm v. Uncas Mining Co.*, 614.

25. **PLEADING — STIPULATION TO ABIDE PRIOR BAR IN ACTION — PLEA.** — In an action on a promissory note, where the answer pleads a prior judgment in favor of the defendant in bar, a stipulation signed by the parties and filed in the case, wherein the plaintiff admits that the indebtedness in controversy was involved in the prior action, and agrees that the subsequent action shall be determined by the prior one, is admissible in support of the plea in bar without being specially pleaded. — *Coubrough v. Adams*, 374.

26. **PRACTICE — DEPOSITION — EVIDENCE OF NON-RESIDENCE OF WITNESS — WAIVER.** — Error in admitting depositions in evidence, without preliminary proof that the witnesses resided out of the county where the cause was being tried, is waived if the party against whom the depositions were offered dispensed with the formal proof of such fact on the trial, and accepted the verbal statement of the opposing counsel as to their non-residence. — *Estate of Learned*, 140.

27. **SECONDARY EVIDENCE OF CONTRACT — DEPOSITION — POSSESSION OF CONTRACT BY ADVERSE PARTY.** — The action was brought by a vendee for the specific performance of a written contract for the sale of land. Prior to the trial, the deposition of a witness was taken, who testified, without objection, to the terms of the contract. At the trial, the defendant objected for the first time to the evidence contained in the deposition, on the ground that secondary evidence of the contract could not be given without proof of the loss or destruction of the original. The plaintiff thereupon showed that the contract was executed in duplicate, one copy of which had been delivered to him, and the other retained by the vendor, the ancestor of the defendants, and that his copy had been subsequently delivered to the vendor, and destroyed by him. The copy retained by the vendor was not accounted for, nor did it appear that any notice to produce it in court had been given. One of the defendants had the copy in his possession, and could have produced it. Held, that the defendants could not object to the evidence. — *Nicholson v. Tarpey*, 608.

28. **DECLARATIONS OF VENDEE TO ASSESSOR — EVIDENCE OF WHEN INADMISSIBLE — ADVERSE POSSESSION.** — In such an action, declarations made by the plaintiff to the assessor, at the time the land in question was assessed, and in the absence of the defendants, to the effect that he was the owner of the land, are not admissible in support of his claim to the adverse possession thereof, or to show that the assessment was made to him. — *Id.*

29. **PRACTICE.** — On the trial, certain evidence stated in the opinion was admitted against the objection of the defendants, and certain objections to questions asked by him on cross-examination were sus-

EVIDENCE (Continued).

tained. *Held*, that the rulings of the court were proper. — *Red Jacket Tribe No. 28, I. O. R. M. v. Gibson*, 128.

30. STRIKING OUT — MOTION FOR MUST BE SPECIFIC. — Where testimony is admitted, some of which is relevant and competent, and intermingled with that which is improper, a motion to strike out should be directed with such precision to the portion attached that no uncertainty may remain as to the testimony challenged; otherwise a refusal to strike out is not error. — *Hellman v. McWilliams*, 449.

See AGENCY, 11, 12; APPEAL, 6, 8; BILL OF PARTICULARS; BOUNDARIES, 2, 3; COMMON CARRIER, 8, 9; CONTEMPT, 2, 3; CORPORATIONS, 1; CRIMINAL LAW, 3, 7, 8, 11, 12, 16, 18, 19, 24, 33, 39; DEDICATION, 5; EJECTMENT, 1, 2; EMPLOYER AND EMPLOYEE, 5; FINDINGS, 3, 7; FRAUDULENT CONVEYANCE, 6; INJUNCTION, 4; INSURANCE, 1; JUSTICE'S COURT, 1; MORTGAGE, 1, 2; NEW TRIAL, 1; NON-SUIT; PARTNERSHIP, 4, 5; PLEADINGS; PUBLIC LANDS, 6, 8; STATUTE OF LIMITATIONS, 4, 6; STREET ASSESSMENT, 2, 5, 7; SWAMP LANDS, 2, 3; TRUST, 11; WATER AND WATER RIGHTS, 5.

EXCEPTION. See APPEAL, 6; BILL OF PARTICULARS; INSTRUCTIONS, 2, 3.

EXECUTION.

DESIGNATION OF PROPERTY TO BE LEVIED ON — WAIVER OF RIGHT BY DEBTOR — REGULARITY OF LEVY. — Under section 189 of the practice act of 1850, an execution debtor had the right of designating the property to be levied upon, but he could not defeat a levy by neglecting or refusing to exercise the right; and in the absence of a showing that such right was exercised by the debtor and disregarded by the officer, the former cannot be heard to complain, nor can a stranger to the writ, having no interest in or lien upon the property seized, question the regularity of the levy for such cause. — *Frink v. Roe*, 296.

2. NOTICE OF SALE — INFORMALITY IN. — A failure to give the proper notice of a sale of real estate under an execution does not invalidate the sale. — *Id.*

3. SALE UNDER EXECUTION — WHAT ESTATE PASSES BY. — On a sale of real property under execution, the interest or estate of the judgment debtor in the property at the date of the sale passes to the purchaser, although acquired after the levy of the execution. — *Id.*

4. FRAUDULENT JUDGMENT — ACTION TO SET ASIDE — ISSUANCE AND RETURN OF. — In an action by a junior judgment creditor to set aside a prior judgment and execution sale of the property of the debtor on the ground of fraud, the complaint need not allege that an execution had been issued and returned unsatisfied, where it is averred that the judgment debtor has not and never had any property except that sold under the fraudulent judgment. — *Lee v. Orr*, 398.

See FORECLOSURE SALE; INJUNCTION, 3, 4.

EXECUTORS AND ADMINISTRATORS.

1. FOREIGN EXECUTRIX — MAY SUE PERSONALLY ON FOREIGN JUDGMENT. — A foreign executrix may maintain an action in this state in her individual name on a judgment recovered by her as executrix

EXECUTORS AND ADMINISTRATORS (Continued).

in another state on a debt due to her testator. — *Lewis v. Adams*, 403.

2. AVERMENTS OF OFFICIAL CAPACITY — SURPLUSAGE. — In such an action, the averments in the complaint of the official capacity of the plaintiff are mere surplusage, and may be disregarded. — *Id.*

See APPEAL, 2; ESTATE OF DECEDEDENT; PARTIES.

EXPERT. See EMPLOYER AND EMPLOYEE; EVIDENCE, 9; WATER AND WATER RIGHTS, 5.

EXPRESS COMPANIES. See COMMON CARRIER, 7.

EXTENSION OF TIME. See NEW TRIAL, 5.

FALSE REPRESENTATIONS.

1. DECREE IN DIVORCE SUIT — REFORMATION OF — KNOWLEDGE OF ATTORNEY. — Pending a suit for divorce, the parties thereto entered into an agreement for the division of their community property in case a divorce should be granted, whereby the wife, the present plaintiff, was to have set apart to her a certain ranch known as the Home Place, consisting of a particular lot, and a tract of land of about twenty acres inclosed therewith. The decree in the divorce suit, to which the plaintiff assented, awarded her the Home Place, but erroneously described it as consisting solely of the lot, thus omitting the twenty-acre tract. At the time of the decree, neither the plaintiff nor her attorney knew of the exact extent and boundaries of the Home Place. The attorney had means by which he might have informed himself on the subject, but omitted to do so, and applied to the defendant for information, who stated to him that the lot covered the entire place. The action was brought to reform the decree so as to include and award to the plaintiff the twenty-acre tract, on the ground that her assent to the decree as rendered had been induced by the false and fraudulent representations of the defendant. Held, that the plaintiff was entitled to the relief prayed for. — *Senter v. Senter*, 619.

2. SALE OF LAND — SETTING ASIDE — MATTERS OF OPINION. — A sale of land will not be set aside at the instance of the vendee on account of false representations by the vendor of mere matters of opinion as to its value and productiveness. — *Rendell v. Scott*, 514.

See PUBLIC LANDS, 1, 5-8.

FICTITIOUS NAME. See SUMMONS, 6.

FINDINGS.

1. OMISSION OF WHEN IMMATERIAL. — Where a finding made is conclusive against the right of the plaintiff to recover, findings upon other issues are unnecessary to support the judgment against him. — *Dyer v. Brogan*, 136.

FINDINGS (Continued).

2. EQUITABLE AVERMENTS IN COMPLAINT — ADMISSIONS IN ANSWER — VERDICT — JUDGMENT. — In an action to recover the possession of real property, and for an injunction, where a verdict is rendered in favor of the plaintiffs, upon which judgment is entered, no findings are necessary upon the equitable averments of the complaint, if they are not denied by the answer. — *Anderson v. Black*, 226.
3. PRACTICE — IMMATERIAL ISSUE — DEFENSE UNSUPPORTED BY EVIDENCE. — An issue raised by a defense upon which no evidence is offered at the trial, and no finding made, is deemed immaterial, and the judgment will not be reversed for want of a finding. — *Senter v. Senter*, 619.
4. APPEAL — ERRONEOUS FINDING — IMMATERIAL ERROR — JUDGMENT — NEW TRIAL. — Where an appeal from the judgment and an appeal from an order refusing a new trial are contained in the same transcript, the judgment will not be reversed or a new trial granted because of the failure of the court to find on a particular issue in favor of the appellant, or because a certain finding was without the issues, if the correction of the findings would not change the result. — *Gates v. McLean*, 42.
5. PRACTICE — SUFFICIENCY OF. — A finding that all the averments of a complaint are true is a sufficient finding of facts, if the answer contains nothing but denials and an admission of matters alleged in the complaint. — *Johnson v. Klein*, 186.
6. PARTY DESIRING CANNOT DICTATE. — A party desiring a finding upon a particular point should specify the point to the court without dictating the terms of the finding; and the refusal of the court to make certain findings presented to it as facts in the case is not erroneous. — *Edgar v. Stevenson*, 286.
7. CONFLICT OF EVIDENCE. — Where the evidence is conflicting, a finding will not be disturbed on the ground of insufficiency of the evidence to justify it. — *Id.*
8. PRACTICE — EXPIRATION OF TERM OF JUDGE — ENTRY OF JUDGMENT AFTER — WAIVER OF. — Where the term of office of the judge who tried the case expires after an order for judgment has been entered, but before the findings have been filed, no valid judgment can be entered in the action without a new trial being had, unless agreed findings are filed or waived by both sides. — *Mace v. O'Reilly*, 231.
9. JUDGMENT ENTERED WITHOUT FINDINGS — MOTION TO VACATE — NOTICE — TIME FOR MAKING MOTION. — If no agreed findings are filed or waived, a judgment entered in conformity with the order after the expiration of the term of office of the trial judge may be set aside for want of findings on the motion of the party in whose favor the judgment is entered, without notice to the opposite party, notwithstanding the latter offers to waive findings, or to have them made by the successor of the judge who tried the case, and tenders to the prevailing party the amount of the judgment. Such a motion may be made after the expiration of six months from the date of the order for judgment, and after the termination of the session of the court at which it was made. — *Id.*
10. MOTION MAY BE RENEWED AFTER DENIAL — JURISDICTION — DISCRETION. — In such a case, the court has jurisdiction, and it is within

FINDINGS (Continued).

its discretion, to allow a motion to vacate the judgment to be renewed, although it had previously been denied. — *Id.*

See **DEDICATION**, 6; **ESTATE OF DECEDENT**, 7; **EVIDENCE**, 13; **MORTGAGE**, 1; **PARTNERSHIP**, 2; **STATUTE OF LIMITATIONS**, 4-6; **STREET ASSESSMENT**, 3; **SUMMONS**, 4; **SWAMP-LANDS**, 2; **TRUST**, 11.

FIRE INSURANCE. See **INSURANCE**, 1, 2.

FIXTURES.

1. **LESSOR AND LESSEE — DEBTOR AND CREDITOR.** — An engine, boiler, and machinery for a flouring mill, erected by a lessee on the demised premises, and securely attached thereto by bolts and screws, are fixtures as between him and his attaching creditors, notwithstanding an agreement between the lessor and lessee that the latter should be at liberty to remove the machinery upon the expiration of the lease. — *McNally v. Connolly*, 3.
2. **REMOVAL OF FIXTURES — CONVERSION INTO PERSONALTY.** — The severance and removal of the fixtures by the lessee converts them into personalty. — *Id.*
3. **ACTION TO RECOVER POSSESSION — DEMAND.** — No demand is necessary before bringing suit to recover the possession of the fixtures after their wrongful severance and removal by the lessee. — *Id.*

FORFEITURE.

CONTRACT FOR SALE OF LAND — FAILURE TO PAY PURCHASE PRICE. — The failure of the vendee under a contract for the sale of land to pay the purchase price within the time stipulated, or to perform other conditions of the contract, is no ground for a decree in equity declaring a forfeiture of his rights. A court of equity will never enforce a penalty or forfeiture. — *McCormick v. Rossi*, 474.

FORGERY. See **CRIMINAL LAW**, 13-16.

FORECLOSURE SALE.

1. **SETTING ASIDE — INADEQUACY OF PRICE.** — A foreclosure sale will not be set aside for mere inadequacy in the price for which the property was sold. — *Central Pacific R. R. Co. v. Creed*, 497.
2. **SURPRISE — NEGLIGENCE — OFFER TO RETURN PURCHASE PRICE.** — Such a sale, if fair and regular upon its face, will not be set aside on the ground of surprise, unless the party claiming to have been surprised was without fault or negligence, and promptly offered to return the purchase-money. — *Id.*
3. **CIRCUMSTANCES NOT CONSTITUTING SURPRISE.** — The sale in question was had on the 22d of December, 1884, under a judgment rendered in favor of the plaintiff on the 10th of October, 1884. The plaintiff knew of the time and place of sale, but neglected to give any instructions in reference thereto until the day preceding the sale, when it telegraphed to its agent and wrote the sheriff

FORECLOSURE SALE (Continued).

offering to purchase the property for the amount of the judgment and costs, and instructing them to make a bid to that effect at the sale. By reason of atmospheric conditions, neither the telegram nor letter was received by the parties to whom they were sent until after the sale. The sale was made to the respondent for a less price than that offered by the plaintiff. The plaintiff received the purchase-money, and kept it for five months, when, without offering to return the money, it moved to set aside the sale on the ground of surprise. *Held*, that the motion was properly denied.—*Id.*

FRAUD. See EXECUTION, 4; FALSE REPRESENTATIONS; HOMESTEAD, 4; PUBLIC LANDS, 4-8, 13, 14; STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

1. **VALIDITY OF INTER SE.**—A conveyance for the purpose of defrauding the creditors of the grantor is valid and binding as between the parties, and as to all other persons except creditors of the grantor.—*Frink v. Roe*, 296.
2. **FRAUD ON SUBSEQUENT PURCHASERS—CONVEYANCE CANNOT BE QUESTIONED IN EJECTMENT.**—Under the statute of frauds of 1850, a sale with the intent to defraud subsequent purchasers is fraudulent as against such purchasers for a valuable consideration and without notice, and as against such purchasers with notice if the grantee in the fraudulent conveyance was privy to the fraud. But the validity of the conveyance cannot be questioned in an action of ejectment if the pleadings contain no proper allegations of the fraud.—*Id.*
3. **RETENTION OF POSSESSION BY VENDOR—EFFECT OF.**—A sale of personal property not accompanied by an immediate delivery and followed by a continued change of possession is void under section 3440 of the Civil Code, not only as against creditors of the vendor, but also as against the executrix of his last will.—*Kelly v. Murphy*, 560.
4. **OWNERSHIP DOES NOT PASS TO VENDEE—REMEDIES OF SELLER.**—Where a sale of personal property is procured by fraud, the ownership of the property is not changed, unless the seller in some way afterwards ratifies the sale; and in the absence of a ratification, the seller may maintain an action to recover possession of the property or damages for its conversion.—*Amer v. Hightower*, 440.
5. **FRAUD—UNDUE INFLUENCE—RESCISSON OF CONTRACT—ACTION FOR—UNREASONABLE DELAY.**—One whose consent to the execution of a contract has been obtained through fraud or undue influence may rescind the contract, but he must do so promptly on discovering the facts which entitle him to rescind. Under the circumstances of the present case, an unexplained delay of fifteen months in commencing the action after knowledge of the facts, held, unreasonable and fatal. *Held further*, that no fraud or undue influence was shown by the complaint.—*Burkley v. Levy*, 250.
6. **EQUITY—ACTION TO ANNUL CONVEYANCE—FRAUD—EVIDENCE.**—In an action by the purchaser to set aside a conveyance on the ground of fraud, a witness for the plaintiff was asked on cross-

FRAUDULENT CONVEYANCE (Continued).

examination whether he knew of any unfair act done by the defendant to induce the sale. *Held*, that the question was improper. — *Red Jacket Tribe No. 28, Improved Order of Red Men v. Gibson*, 128.

7. RETURN OF PURCHASE-MONEY — SATISFACTION OR MORTGAGE — REVIVAL OF LIEN. — In such an action, the plaintiff is entitled to a return of the purchase-money on obtaining a decree annulling the conveyance; and it appearing that a portion of the purchase-money had been used by one of the defendants to satisfy a mortgage held by a third person on certain other land belonging to him, *held*, that the plaintiff was entitled to have the lien of the mortgage revived in its favor. — *Id.*

See AGENCY, 8.

GAMING. See CRIMINAL LAW, 17-20.

GARNISHMENT. See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2.

GOVERNMENT LANDS. See PUBLIC LANDS.

GRAND LARCENY. See CRIMINAL LAW, 22, 23.

GRANTOR AND GRANTEE. See ADVERSE POSSESSION, 2.

GROWING CROPS.

CHATTTEL MORTGAGE — TORTIOUS REMOVAL DOES NOT DESTROY LIEN — CONVERSION. — The lien created by a duly recorded chattel mortgage on a growing crop is not destroyed by the tortious removal of the crop from the land of the mortgagor by a third person having constructive notice of the lien. In such a case, section 2972 of the Civil Code does not apply, and the mortgagee may maintain an action against the person removing the crop for its conversion. — *Wilson v. Prouty*, 198.

GUARANTY. See LEASE, 6; LETTER OF CREDIT.

GUARDIAN AND WARD.

1. APPOINTMENT OF — NOTICE TO RELATIVES — CONSENT — RECORD. — Under the statute in force in May, 1866, the appointment of a guardian of the estate of a minor cannot be collaterally attacked for insufficiency of the notice to the relatives of the minor of the application for guardianship, if the record recites that all the near relatives of the minor in the county consented to the appointment. — *Burroughs v. De Couts*, 362.
2. SALE OF LAND BY GUARDIAN — ACTION TO RECOVER — STATUTE OF LIMITATIONS. — Under section 389 of the probate act, an action to recover lands sold by a guardian must be brought by the minor within three years after arriving at majority; otherwise the action is barred. — *Id.*

HIGHWAY. See STREET AND HIGHWAY.

HOMESTEAD.

1. **PROPERTY SUBJECT TO TRUST DEED — DECLARATION MAY BE FILED ON.** — A person residing with his family on community property, which he had previously conveyed by a deed of trust to secure an indebtedness, has such an interest in the property, notwithstanding the trust deed, as entitles him to make a valid claim of homestead thereon. — *King v. Gotz*, 236.
2. **PROPERTY NOT OCCUPIED BY CLAIMANT — CLAIM OF AS HOMESTEAD.** — A declaration of homestead covering certain premises on which the claimant resided, and certain other premises which were not occupied by him, is valid so far as the land resided on is concerned. — *Id.*
3. **DECLARATION — ESTIMATED VALUE OF PREMISES.** — A declaration of homestead is not invalid, although the value of the premises claimed as a homestead is estimated at seven thousand dollars. — *Id.*
4. **DEBTOR MAY DECLARE HOMESTEAD — FRAUD ON CREDITORS.** — The head of a family having property subject to a homestead declaration, and who is indebted to third persons, may, notwithstanding his indebtedness, exercise his right of homestead; and the fact of his having done so is not in itself sufficient evidence to invalidate the homestead claim at the instance of his creditors. — *Id.*
5. **MATERIAL-MEN CANNOT OBTAIN LIENS ON.** — Under section 1241 of the Civil Code, one who furnishes materials for the construction of a building on real property after it has been impressed with a homestead cannot obtain a lien thereon for the materials furnished. — *Richards v. Shear*, 187.

See **SPECIFIC PERFORMANCE**, 5.

HUSBAND AND WIFE.

1. **DEED TO MARRIED WOMAN — COMMUNITY PROPERTY — PRESUMPTION.** — Real property conveyed to a married woman by a deed which shows on its face a consideration paid by her is presumed to have been purchased with community funds, and to be community property, and as such is liable for the debts of the husband. The presumption may be overcome by extrinsic proof that the consideration paid was the separate funds of the wife; but in the absence of such evidence, the presumption is absolute and conclusive. — *Schuylar v. Broughton*, 282.
2. **MONEY BORROWED BY MARRIED WOMAN — INVESTMENT OF.** — Money borrowed by a married woman to invest in real property during her marriage is community property, unless it be borrowed by her upon the faith of her existing separate property, which she mortgages or pledges as security for its payment, or against which her contract may be enforced. — *Id.*
3. **CONSIDERATION FOR PURCHASE — PARTLY SEPARATE AND PARTLY BORROWED MONEY.** — Real property purchased by a married woman in her own name, partly with money belonging to her separate funds, and partly with money borrowed by her for that purpose, becomes in part the separate property of the wife, and in part community property. In such a case, the wife becomes a tenant in common of the land with her husband in the proportion that the separate funds paid by her bear to the whole purchase price. — *Id.*

HUSBAND AND WIFE (Continued).

4. COMMUNITY INTEREST LIABLE FOR HUSBAND'S DEBTS.—Lands so purchased, so far as they are community property, may be taken in satisfaction of an execution against the husband.—*Id.*
5. ACTION FOR SUPPORT AND MAINTENANCE—ORDER FOR COUNSEL FEES—STAY OF TRIAL—DISCRETION.—In an action by a wife against her husband for permanent support and maintenance, the court has discretion to refuse to proceed with the trial at the request of the defendant until he has complied with an order made *pendente lite* directing him to pay counsel fees to the plaintiff, or until the order has been reversed or annulled on appeal.—*Winter v. Superior Court*, 295.
6. ACTION FOR SUPPORT AND MAINTENANCE—COUNSEL FEES FOR PROSECUTION OF APPEAL—TRIAL COURT MAY ORDER.—In an action by a wife against a husband for permanent support and maintenance, after an appeal has been taken by the defendant from an order made *pendente lite*, directing him to pay counsel fees to the plaintiff, the trial court has power, within the bounds of a proper discretion, to order him to pay further counsel fees on the appeal.—*Ex parte Winter*, 291.
7. MARRIAGE—LIVING TOGETHER AS HUSBAND AND WIFE.—An offer to prove that a man and woman lived together as husband and wife is not an offer to prove their marriage.—*Kelly v. Murphy*, 560.

See MARRIED WOMEN; PLEADINGS, 2.

IMMIGRATION COMMISSIONER.

1. FEES FOR INSPECTION OF PASSENGERS—STATE MAY RECOVER FROM COMMISSIONER.—The commissioner of immigration of the port of San Francisco cannot justify his refusal to pay into the state treasury the fees collected by him under section 2955 of the Political Code, for the inspection of passengers on vessels arriving in that port from foreign ports, on the ground that the section is unconstitutional and the collections illegal, or because the board of supervisors of the city and county of San Francisco had failed to establish a lazaretto or lepers' quarters as required by the section.—*People ex rel. Dunn v. Bunker*, 212.
2. ACTION TO COLLECT FEES—UNPAID DEPUTIES' SALARIES—ATTORNEY'S FEE.—In an action by the controller against the commissioner to recover the fees so collected, the defendant is not entitled to credit for items alleged by him to be due for unpaid deputies' salaries and attorney's fees in an action against him as commissioner.—*Id.*

INDEMNITY. See SPECIFIC PERFORMANCE, 1-3.

INDEMNITY LANDS. See PUBLIC LANDS, 12-14.

INDORSEMENT. See INSURANCE, 3; NONSUIT.

INJUNCTION.

1. PRELIMINARY INJUNCTION—CESSATION OF RESTRAINING ORDER.—In an action for an injunction, the force of a restraining order

INJUNCTION (Continued).

previously issued ceases upon the granting of an injunction *pendente lite*. — *Cohen v. Gray*, 85.

2. OPENING PUBLIC STREET — REPEAL OF ACT AUTHORIZING. — An injunction to restrain the board of trustees of the town of Alameda from proceeding with the opening of a public street under the act of March 23, 1876, granted after the repeal of the act, is unnecessary, irregular, and erroneous. — *Id.*
3. LAND PURCHASED BY MARRIED WOMAN — SEPARATE PROPERTY — SALE OF UNDER EXECUTION AGAINST HUSBAND. — A married woman is entitled to an injunction to restrain a threatened sale, under an execution against her husband, of real property purchased by her during coverture in her own name and with her separate property. — *Tibbets v. Fore*, 242.
4. CLOUD ON TITLE — PRESUMPTION AS TO COMMUNITY PROPERTY — EVIDENCE TO OVERCOME. — In such a case, the execution sale would cast a cloud upon her title, because, in an action of ejectment brought by the execution purchaser founded upon the sheriff's deed, she would be compelled, in order to overcome the presumption that the land was community property, to introduce evidence *dehors* the record, showing that the purchase was made with her separate estate. — *Id.*
5. EJECTMENT — VEXATIOUS ACTION — CROSS-COMPLAINT — INJUNCTION AGAINST PROSECUTION OF ACTION. — The action was brought to recover the possession of certain land. The answer denied the allegations of the complaint, and pleaded in bar of the action certain judgments rendered in other actions, which were alleged to have determined adversely to the plaintiff the title to the land in controversy. The defendants also filed a cross-complaint for an injunction restraining the plaintiff from asserting any title to the land, on the ground that his action was vexatious. During the pendency of the action, the defendants, upon affidavits and the judgment rolls in the actions pleaded in bar, moved for an order perpetually enjoining the plaintiff from further prosecuting the action. The court granted the motion. Held, that the order was erroneous. — *Peterson v. Weissbein*, 423.

See AMENDMENTS, 3; CORPORATIONS, 2; COSTS; WATER AND WATER RIGHTS, 4.

INSOLVENCY.

1. PETITION FOR INVOLUNTARY — PARTNERSHIPS AS PETITIONERS — NAMES OF MEMBERS. — Under section 8 of the insolvent act of April 16, 1880, a petition in involuntary insolvency which describes the petitioning creditors as firms or copartnerships is sufficient, although the names of the persons comprising the firms are not given. — *In the Matter of Russell*, 132.
2. FACTS SHOWING INDEBTEDNESS MUST BE ALLEGED. — In such a proceeding, the petition should allege the facts showing the indebtedness of the respondent to at least five of the petitioners, with the same degree of certainty and fullness as would be requisite in a complaint in an ordinary action to recover the indebtedness. — *Id.*

See APPEAL, 8; SPECIFIC PERFORMANCE, 4.

INSTRUCTIONS.

1. INSTRUCTION NEED NOT BE REPEATED.—The refusal to give instructions which have already been given in substance is not error.—*People v. Pacheco*, 473.
2. EXCEPTION.—A party cannot except to instructions given at his own instance.—*Sierra U. W. & M. Co. v. Baker*, 572.
3. CONTRADICTORY INSTRUCTIONS—RECORD MUST SHOW EXCEPTION — APPEAL.—Contradictory instructions are erroneous, but the error will not be considered on appeal, unless the record shows that an exception was taken to the instructions at the trial.—*Id.*
4. ASSUMPTION OF FACT.—An instruction which assumes a fact as proved will not warrant a reversal if the fact is admitted or there is no shadow of conflict of evidence with respect to it.—*People v. Phillips*, 61.
5. REVIEW OF ON APPEAL.—Alleged errors in the instructions to the jury in a criminal case will not be considered on appeal if the instructions are not embodied in the record.—*People v. Marseiler*, 98.
6. FAILURE TO REDUCE INSTRUCTIONS TO WRITING.—In a criminal prosecution, the giving of oral instructions to the jury, which are not reduced to writing either by the judge or any other person, nor taken down by the short-hand reporter, is error.—*People v. Carrillo*, 643.

See CRIMINAL LAW, 2, 7, 13, 23, 25, 26, 33; EMPLOYER AND EMPLOYEE; INSURANCE, 5; MINES AND MINING, 2.

INSURANCE.

1. FIRE INSURANCE—PLEADINGS—EVIDENCE TO CONTRADICT—REPRESENTATIONS IN APPLICATION.—The action was brought on a fire insurance policy to recover the amount of an alleged loss. The complaint averred that the policy was issued on an application made and signed by the plaintiff, which contained certain material representations as to the manner in which the building was occupied. On the trial, the plaintiff, against the objections of the defendant, testified that he did not know what representations the application contained. Held, that the evidence was inadmissible under the complaint.—*Menk v. Commercial Insurance Company of California*, 585.
2. FIRE INSURANCE—POLICY—CONDITIONS FOR ARBITRATION—PREMATURE ACTION.—The action was brought upon a policy of fire insurance to recover the amount of a loss. The policy contained certain conditions and stipulations, quoted in the opinion, which provided in effect that if the amount of the loss could not otherwise be adjusted to the satisfaction of the parties, it should be adjusted by a mode of arbitration therein prescribed, and that until such adjustment, or a fair effort on the part of the insured to obtain it, no action could be maintained by the insured to recover for a loss. No arbitration or award to determine the amount of the loss in question was ever had, nor any demand made therefor by the insured. Held, that the action could not be maintained.—*Adams v. South British and National Fire and Marine Insurance Companies of New Zealand*, 198.
3. MARINE INSURANCE—TIME POLICY—GENERAL PERMISSION TO NAVIGATE—INDORSEMENT CONSTRUED.—The action was brought on a time policy of marine insurance to recover for a total loss.

INSURANCE (Continued).

According to the terms written in the body of the policy, the vessel insured was permitted, with certain exceptions, to prosecute voyages anywhere upon the navigable waters of the globe. On the back of the policy, by agreement of the parties thereto, a written indorsement was made, as follows: "Vessel to be employed on the Gulf of California and captain is privileged to act as his own pilot without prejudice to this insurance." Held, that the effect of the indorsement was not to restrict the vessel to the Gulf of California.—*Gulf of California Navigation and Express Company v. State Investment and Insurance Company*, 586.

4. **PLEADING — ALLEGATION OF TOTAL LOSS — INSUFFICIENT DENIAL.** — The complaint alleged that the vessel insured, while employed in the Gulf of California, was on a certain day totally lost by the perils of the sea. The answer denied that the vessel, while employed in the Gulf of California, was, on the day alleged, or at any other time, totally lost by the perils of the sea. Held, that the answer did not deny the total loss of the vessel by the perils of the sea.—*Id.*
5. **VERDICT — ABANDONMENT OF VESSEL — PROCEEDS OF SALE — PRESUMPTION OF RECEIPT BY INSURED — INSTRUCTION.** — The plaintiff recovered a verdict for the amount of the policy. On the trial, the defendant asked the court to instruct the jury that the verdict should be reduced by the sum for which the vessel was sold after its abandonment, on the ground that the plaintiff was presumed to have received the proceeds of the sale, and that the defendant should have credit therefor. No issue upon this point was raised by the pleadings. Held, that the instruction was properly refused.—*Id.*

INTENT. See **CRIMINAL LAW**, 3, 7, 16; **DEDICATION**, 3.

INTEREST. See **ESTATE OF DECEDENT**, 16.

INTERPRETER. See **EVIDENCE**, 14.

JEOPARDY. See **CRIMINAL LAW**, 1, 2.

JOINT DEBTORS. See **COUNTERCLAIM**; **JUDGMENT**, 2.

JUDGE. See **FINDINGS**, 8, 9; **PLACE OF TRIAL**, 1.

JUDGMENT.

1. **DEFECTS AND IRREGULARITIES.** — Mere defects or irregularities in the process or proceedings, against a party not objecting to them, do not affect the validity of a judgment in the case, or the rights of the parties to it; and a plaintiff in whose favor such a judgment is entered cannot question it.—*Central Pacific Railroad Company v. Creed*, 497.
2. **JOINT JUDGMENT — ACTION ON AGAINST JOINT DEBTOR — AMENDMENT — STATUTE OF LIMITATIONS.** — Where an action on a judgment against several joint debtors is originally commenced against one of them alone, a subsequent amendment to the complaint, by

JUDGMENT (Continued).

inserting the names of the other judgment debtors as defendants, does not change the nature of the action against the original defendant, nor extend the running of the statute of limitations in his favor until the filing of the amendment.—*Lewis v. Adams*, 403.

3. FOREIGN JUDGMENT—REVIEW OF ERROR.—In an action on a judgment rendered in another state, error in the manner of entering the judgment will not be reviewed.—*Id.*
4. VERDICT—NOMINAL DAMAGES.—A judgment for one cent damages entered upon a special verdict in favor of the plaintiff for "nominal damages," if in other respects proper, will not be set aside for uncertainty in the verdict.—*Davidson v. Devine*, 518.
5. SUSTAINING PLEA—PROPER JUDGMENT—ABATEMENT.—Where a plea of the pendency of a former action is sustained, the proper judgment to be entered is one abating the subsequent action, and not a judgment that the plaintiff take nothing thereby.—*Coubrrough v. Adams*, 374.

See AFFIDAVIT OF MERITS; APPEAL, 3; BAIL; CONTEMPT, 4, 5; CRIMINAL LAW, 20, 27; ESTATE OF DECEDEDENT, 16, 17, 19; EXECUTION, 4; EXECUTORS AND ADMINISTRATORS, 1; FINDINGS, 1, 4, 8, 9; JUSTICE'S COURT, 3; NEGLIGENCE, 3; PLACE OF TRIAL, 3; PUBLIC LANDS, 4, 8; SUMMONS, 1, 4.

JURISDICTION. See CONTEMPT, 3, 5; ESTATE OF DECEDEDENT, 2; FINDINGS, 10; JUSTICE'S COURT, 1, 3; PUBLIC LANDS, 3; SUMMONS, 1.

JURY AND JURORS.

1. JURY TRIAL—RIGHT TO WHEN NOT WAIVED—FAILURE TO DEMAND—RULE OF COURT.—The right to a jury trial is not waived by neglecting to demand a jury at the time the cause is called to be set for trial, notwithstanding a rule of court that a jury shall then be demanded.—*Biggs v. Lloyd*, 447.
2. PRACTICE—JUROR—NON-RESIDENCE—GENERAL CHALLENGE FOR CAUSE—EXCEPTION.—A challenge to a juror on the ground that he is not qualified to serve by reason of his non-residence in the county in which the trial is had in a general challenge for cause, for the disallowance of which no exception is provided for by the Penal Code.—*People v. Fong Ah Sing*, 8.

See EMPLOYER AND EMPLOYEE, 4; NEW TRIAL, 2; SLANDER, 2.

JUSTICE'S COURT.

1. APPEAL ON QUESTIONS OF LAW—ARBITRARY DISMISSAL OF—JURISDICTION—CERTIORARI.—An appeal from the Justice's Court taken on questions of law alone cannot be dismissed by the Superior Court on the ground that the appeal should have been taken on questions of law and fact, if the statement on appeal contains the evidence upon which the question of law involved in the appeal was raised and decided in the Justice's Court. Such a dis-

JUSTICE'S COURT (Continued).

missal is in excess of the jurisdiction of the Superior Court, and will be annulled on *certiorari*. — *Carlson v. Superior Court*, 628.

2. **NOTICE OF APPEAL — WAIVER OF OBJECTION — VOLUNTARY APPEARANCE OF RESPONDENT.** — On an appeal from a Justice's Court, the voluntary appearance of the respondent and his participation without objection in the trial in the Superior Court, and in the subsequent preparation of a statement for a new trial, is a waiver of any insufficiency in the notice of appeal or in the proof of service thereof. — *Matthews v. Superior Court of Marin County*, 527.
3. **ACTION FOR POSSESSION OF PERSONAL PROPERTY — ALLEGATION OF VALUE — JURISDICTION.** — Neither the Justice's Court nor the Superior Court on appeal has jurisdiction of an action to recover the possession of specific personal property alleged to exceed three hundred dollars in value, although the complaint prays judgment for a less amount in case possession cannot be had. — *Shealor v. Superior Court of Amador County*, 564.

JUSTIFIABLE HOMICIDE. See **CRIMINAL LAW**, 25.

KNOWLEDGE. See **EMPLOYER AND EMPLOYEE**, 2, 3; **FALSE REPRESENTATIONS**, 1.

LAND. See **PUBLIC LANDS; SWAMP LANDS; VENDOR AND VENDEE**.

LANDLORD AND TENANT.

TENANCY AT SUFFERANCE OR AT WILL — TERMINATION OF — DEATH OF LANDLORD — EJECTMENT BY HEIR — NOTICE TO QUIT — DEMAND. — The death of the landlord terminates a tenancy at sufferance or at will, and thereafter the possession of the tenant is wrongful as against his heirs, who become vested with a right of entry, and may maintain ejectment without previously serving a notice to quit, or demanding possession of the tenant. — *Joy v. McKay*, 445.

See **FIXTURES; LEASE**.

LARCENY. See **GRAND LARCENY**.

LEASE.

1. **QUIET ENJOYMENT — COVENANT OF TITLE AND RIGHT TO CONVEY — BREACH OF.** — A lease with an express covenant for quiet enjoyment implies a covenant that the lessor has title to the property leased, and power and right to convey it; and such implied covenant is immediately broken if the lessor has made a prior lease of part of the demised premises, which is still outstanding when the subsequent lease is executed. — *McAlester v. Landers*, 79.
2. **EVICTION — DISPOSSESSION NOT NECESSARY.** — A covenant for quiet enjoyment in a lease is not broken without an eviction of the lessee, either actual or constructive. To constitute an eviction, the lessee need not be actually dispossessed. — *Id.*

LEASE (Continued).

3. RECOVERY IN TRESPASS AGAINST LESSEE.—A recovery in an action of trespass brought by a prior lessee against a subsequent lessee of the same land is a sufficient eviction to constitute a breach of the covenant for quiet enjoyment contained in the subsequent lease, although the action was not commenced until after the expiration of the prior lease.—*Id.*
4. MEASURE OF DAMAGES.—In such a case, the detriment caused by the breach of the covenant cannot be less than the amount of the judgment for damages and costs recovered against the covenantee.—*Id.*
5. ACTION FOR RENT—LESSEE MAY RECOUP DAMAGES—COUNTER-CLAIM.—When damages have been sustained by a lessee on account of the breach of a covenant in the lease by the lessor, if an action for rent is brought, the lessee may elect to recoup his damages from the rent, or bring a separate action therefor; and the fact that the lessee has paid the rent for the greater part of the term will not deprive him of the right to recover his damages for the entire term by way of counterclaim.—*Id.*
6. PAYMENT OF RENT—EXONERATION OF GUARANTOR.—A guarantor for the payment of the rent reserved in a lease is exonerated from liability on his guaranty if the lessor has, by the breach of a covenant in the lease, caused damages to the lessee equal to the amount of the rent.—*Id.*

See LANDLORD AND TENANT; WATER AND WATER RIGHTS, 1.

LEGACY. See ESTATE OF DECEASED, 20.

LETTER OF CREDIT.

LIABILITY OF DRAWER—GUARANTY OF CREDIT TO THIRD PERSON.—In 1877, John Mel & Sons, merchants of San Francisco, having a branch house at Bordeaux, France, and doing their banking business with the plaintiffs, obtained from the defendants, then doing business under the name of Falkner, Bell & Co., the following letter of credit:—

“ SAN FRANCISCO, Sept. 20, 1877.
THE MERCHANTS’ BANKING COMPANY OF LONDON (LIMITED),
112 CANNON STREET, LONDON.—Dear Sirs: At the request of
Messrs. John Mel & Sons of this city, we hereby authorize Messrs.
A. Lafargue & Co., of Bordeaux, to draw on you at sixty days’
sight for our account to the amount of three thousand pounds
sterling (£3,000).”

“ All drafts must be drawn at Bordeaux, and be accompanied by due advice. This credit to be in force for twelve months, from 31st October, 1877, to 31st October, 1878. We are, dear sir, yours faithfully,

“ FALKNER, BELL & CO.”

The plaintiffs and the bank were duly advised of the issuance of the letter, which was deposited by Mel & Sons with the plaintiffs as security for advances that might be made to them by the latter. During the period in which the letter of credit was to remain in force, and upon the faith and credit thereof, the plaintiffs advanced about nineteen thousand dollars to Mel & Sons, of which a balance of \$13,441.54 remained unpaid. On the 10th of October, 1878, they drew a bill of exchange for three thousand pounds on

LETTER OF CREDIT (Continued).

the Merchants' Banking Company at sixty days' sight, which they requested that bank to pay, and charge according to the terms of the letter of credit. The draft was accompanied by a letter of advice and notice, and was duly presented for acceptance and payment. The bank refused to accept or pay it, whereupon it was protested for non-acceptance and non-payment. The action was brought on the letter of credit to recover the amount of the draft. *Held*, that the defendants were liable, as the letter of credit was a guaranty by them of the credit of Mel & Sons during the time and for the amount therein specified, and of the acceptance and payment by the Merchants' Banking Company of all drafts drawn by the plaintiffs in conformity with the letter. — *Lafargue v. Harrison*, 380.

LEVY. See EXECUTION, 1.

LIBEL.

1. BREACH OF TRUST BY AGENT — FALSE PUBLICATION CHARGING IS LIBELOUS — OBLOQUY.—The action was brought to recover damages for an alleged libel. The plaintiff, as the agent of certain residents of the town of Riverside, who were interested in the cultivation of fruit, had taken specimens of fruit grown by them for exhibition at the World's Fair in New Orleans. The alleged libel consisted in the publication in a newspaper of an article, quoted in the opinion, in which the conduct of the plaintiff as such agent was severely criticised. The complaint alleged that the article intended to charge, and was so understood by its readers, that the plaintiff, in violation of his trust, had corruptly failed to make a proper exhibit of fruit sent by the contributors, but had appropriated it himself, and entered it in his own name and for his own benefit; that the exhibit had not been conducted in an honorable or upright manner, and that he had failed to make any report of his actions as such agent, because the report, if given, would disclose his corrupt and dishonest acts. *Held*, that the article was calculated to expose the plaintiff to obloquy, and if false, was libelous. — *Bettner v. Holt*, 270.
2. OBLOQUY DEFINED.—To expose a person to obloquy is to expose him to censure and reproach. — *Id.*

See SLANDER.

LICENSE.

1. MUNICIPAL CORPORATIONS — REGULATING SALE OF LIQUORS — CONSTITUTIONAL LAW.—The right to pursue a lawful employment is one of the privileges and immunities guaranteed to a citizen by the constitution of the United States; but such right is not abridged, within the meaning of the fourteenth amendment to the constitution, by a municipal ordinance which merely regulates the sale of liquors and imposes a license thereon without prohibiting their sale. — *In the Matter of Bickerstaff*, 35.

LICENSE (Continued).

2. CONDITIONS TO ISSUANCE OF LICENSE—REASONABLENESS OF.—An ordinance of the city of Stockton, passed on the 25th of May, 1885, provided that a license to carry on the business of selling liquors could only be obtained by an application to the city council, founded upon the petition of the applicant, accompanied by a certificate of five respectable citizens of the neighborhood in which the business is to be conducted as to his character. The ordinance further provided that upon complying with this condition the applicant should be entitled to a license if the city council found, from the certificate and the report made to it by the officers to whom the petition had been referred, that he was qualified to carry on the business. *Held*, that the conditions imposed upon the issuance of the license were not unreasonable, and that the ordinance was valid. — *Id.*
3. SALE OF LIQUORS—SUPERVISORS MAY APPOINT COLLECTOR—SALARY—ACTION TO RECOVER LICENSE.—The board of supervisors of a county have authority to appoint an agent to collect the license taxes imposed by an ordinance upon the business of selling liquors at retail, to fix the compensation to be paid him therefore, and to empower him to direct actions against persons failing to procure licenses. — *County of Amador v. Kennedy*, 458.
4. DISCRIMINATING RATES BETWEEN COUNTRY AND CITY.—Such an ordinance is not invalid because it fixes a less rate of license for the business of selling liquors at a wayside tavern or watering-place than for the same business carried on in a village, town, or city. — *Id.*
5. BOARD OF SUPERVISORS—PASSAGE OF ORDINANCE.—Under section 4045 of the Political Code, an ordinance of a board of supervisors fixing the rates of county licenses is not invalid because not passed on the first Monday of October, if the matter of fixing the rates of licenses was considered by the board on that day, and continued from day to day, and the ordinance was finally passed as soon as possible thereafter. — *People v. Cole*, 59.
6. RECORDING ORDINANCE.—The county-government act of March 14, 1883, does not require that the ordinance shall be recorded before it goes into effect. — *Id.*

See DEDICATION, 4; VENDOR AND VENDEE, 2.

LIEN. See ATTACHMENT; FRAUDULENT CONVEYANCE, 7; GROWING CROPS; HOMESTEAD, 5; MECHANIC'S LIEN; MINER'S LIEN; MORTGAGE.

LIMITATIONS. See STATUTE OF LIMITATIONS.

LIQUORS. See LICENSE.

LOCATION. See MINES AND MINING.

LOTTERY TICKET.

1. BOND—TIME OF PAYMENT DETERMINED BY CHANCE—PREMIUM ON BOND.—The petitioner was convicted of selling a lottery ticket. The supposed lottery ticket was one of a large number of bonds

LOTTERY TICKET (Continued).

issued by the city of Brussels. The bond in question is numbered 387, and provided that the holder should be entitled to the repayment of the principal, with interest thereon. It further provided, in effect, that a certain number of the bonds should be payable each year, and in order to ascertain what particular bonds should be payable during a given year, an annual drawing should be had, and the bonds bearing the numbers drawn thereat should become due and payable. It further provided that the holders of bonds bearing the first forty numbers drawn should be paid premiums ranging from twenty-five thousand francs for the first down to two hundred francs for the last. *Held*, that the bond was not a lottery ticket within the meaning of sections 319 and 321 of the Penal Code.—*Ex parte Shobert*, 632.

LUGGAGE. See COMMON CARRIER, 1-4, 6, 7.

MACHINERY. See EMPLOYER AND EMPLOYEE.

MAINTENANCE. See SUPPORT AND MAINTENANCE.

MALICIOUS PROSECUTION.

EXCESSIVE DAMAGES.—The action was brought to recover damages for a malicious prosecution in causing the arrest of the plaintiff on a charge of simple assault. The plaintiff, after his arrest, was not confined in jail or subjected to any real hardship or act of oppression, or injured in his business or social standing, and the charge against him was dismissed in the Police Court. A verdict was rendered in favor of the plaintiff for four thousand dollars. *Held*, that the verdict was excessive, and should be reduced to one thousand dollars.—*Phelps v. Cogswell*, 201.

MANDAMUS. See CONTEMPT, 5; ROAD OVERSEER.

MANSLAUGHTER. See MURDER AND MANSLAUGHTER.

MAPS. See BOUNDARIES, 3; DEDICATION, 1, 2.

MARINE INSURANCE. See INSURANCE, 3-5.

MARRIAGE. See ESTATE OF DECEDENT, 11; HUSBAND AND WIFE, 7.

MARRIED WOMEN.

1. DEBTOR AND CREDITOR—EXTENSION OF TIME FOR PAYMENT—DEED OF TRUST—CONSIDERATION.—An extension of time given by a creditor to a debtor within which to pay his indebtedness, and an agreement by him to accept payment in installments, are sufficient considerations to support a deed of trust executed by the wife of the debtor on her separate property to secure the indebtedness.—*Burkly v. Levy*, 250.

MARRIED WOMEN (Continued).

2. **CONTRACT OF MARRIED WOMAN — SECURITY FOR INDEBTEDNESS OF HUSBAND — RIGHTS OF CREDITORS.** — Under section 158 of the Civil Code, a married woman may enter into any agreement or transaction respecting her property which she might if unmarried. She may mortgage or convey it by deed of trust to secure the debts of her husband, and having done so, his creditors may enforce their claims against it in the same manner and to the same extent that they could if it were his property, and not hers. — *Id.*

See **ESTATE OF DECEASED, 19; HUSBAND AND WIFE; INJUNCTION, 3, 4.**

MASTER AND SERVANT. See **EMPLOYER AND EMPLOYEE.**

MATERIAL-MAN. See **HOMESTEAD, 5; MECHANIC'S LIEN, 1-3.**

MEASURE OF DAMAGES. See **DAMAGES.**

MECHANIC'S LIEN.

1. **MATERIAL-MAN — LIABILITY OF OWNER OF BUILDING.** — A material-man who has furnished materials to the original contractor of a building to be used by him in its construction, is only entitled to be paid therefor by the owner of the building from that portion of the contract price which remains due and unpaid to the contractor by the owner when the lien for the materials was filed. — *Turner v. Strenzel*, 28.

2. **ACTION TO ENFORCE LIEN — NECESSARY AVERMENTS — INSUFFICIENT COMPLAINT.** — The complaint in an action to enforce the lien of a material-man is insufficient if it fails to allege that anything was due from the owner to the original contractor when the lien was filed, notwithstanding it alleges that during the construction of the building the owner compelled the contractor to abandon the work, took possession of the building, completed it, used the materials furnished the contractor in its completion, and withholds from the contractor a large portion of the contract price. — *Id.*

3. **LIEN OF MATERIAL-MAN — ABANDONMENT OF BUILDING BY CONTRACTOR — COMPLETION BY OWNER — PAYMENT OF CONTRACTOR.** — Where a contractor for the erection of a building abandons the work before its completion, after being paid in full by the owner for the work already done, a material-man is not entitled to a lien on the building for materials furnished the contractor for its construction, unless the owner afterwards completes it for a less amount than the balance of the contract price. — *Wiggins v. Bridge*, 437.

4. **SUBCONTRACTOR — LIEN FOR BALANCE DUE — LIABILITY OF OWNER.** — Prior to the amendments of March 18, 1885, to the sections of the Code of Civil Procedure regulating the liens of mechanics, a notice by a subcontractor to the owner of a building which is being constructed that a balance is due him on his subcontract from the original contractor does not impose on the owner the duty of

MECHANIC'S LIEN (Continued).

retaining a portion of the contract price to satisfy any lien which the subcontractor might subsequently file.— *McCants v. Bush*, 125.

See HOMESTEAD, 5; MINER'S LIEN.

MESSENGER. See PUBLIC MESSENGER.**MINER'S LIEN.**

1. **FORECLOSURE OF — ALLEGATION OF NON-PAYMENT — DEMURRER.** — In an action to foreclose a miner's lien, an allegation that the defendant, for whom the plaintiff performed the services for which the lien was filed, has paid to the plaintiff no part of the amount due therefor, and that the same is now due and owing to the plaintiff from the defendant, is a sufficient averment of non-payment, in the absence of a demurrer.— *Palmer v. Uncas Mining Company*, 614; *Holm v. Unoas Mining Company*, 614.
2. **RIGHT TO LIEN — WHEN NOT LOST BY GIVING ORDER ON MINE-OWNER.** — A miner does not lose his right to a lien by giving an order on the owner of the mine for a portion of the amount due him for his labor thereon, if the order was not received by the payee in payment of any claim against the drawer, nor paid or accepted by the drawee, but returned to the drawer before the filing of his claim of lien.— *Id.*
3. **SUPERINTENDENT OF MINE — RIGHT OF TO LIEN.** — One performing manual labor in and upon a mine is entitled to a lien therefor, though called the superintendent of the mine.— *Id.*

MINES AND MINING.

1. **MINING CLAIM — ACTION FOR POSSESSION — MONUMENTS — NOTICE — EVIDENCE — CROSS-EXAMINATION.** — The action was brought to recover the possession of a certain mining claim. On the trial, a witness for the plaintiffs was asked on cross-examination as to the location of a side-line monument and notice. On his examination in chief, he had not testified as to such matters. *Held*, that the question was not responsive to the examination in chief, and was properly disallowed.— *Anderson v. Black*, 226.
2. **SUFFICIENCY OF LOCATION — MARKING BOUNDARIES — INSTRUCTION.** — In such an action, the question whether the location of the plaintiffs was so distinctly marked on the ground that its boundaries could be readily traced is for the jury; and where there is evidence to that effect, the court should not instruct the jury that the omission to erect a monument at a certain corner of the claim would be fatal to the plaintiffs' location.— *Id.*
3. **EXCESSIVE LOCATION — VALIDITY OF CANNOT BE FIRST QUESTIONED ON APPEAL.** — An objection to the validity of the location on the ground of the extent of the claim refused consideration because not taken at the trial. — *Id.*
4. **LOCATION OF MINING CLAIMS — AGREEMENT FOR — RIGHTS OF PARTIES AFTER DISSOLUTION — TRUST.** — Where an agreement providing for the prospecting and location of mining claims for the

MINES AND MINING (Continued).

benefit of all the parties thereto is dissolved by mutual consent, neither of the parties is under any obligation to the others to perfect locations commenced in pursuance of the agreement; and subsequent locations covering the same ground made by some of them are not held in trust for the others. — *Page v. Summers*, 121.

See **MINER'S LIEN; NEGLIGENCE, 1.**

MINOR. See **GUARDIAN AND WARD.**

MONEY. See **COMMON CARRIER, 2, 4, 5.**

MONUMENTS. See **MINES AND MINING, 1, 3.**

MORTGAGE.

1. **DEED ABSOLUTE ON ITS FACE — FINDING — CONFLICT OF EVIDENCE.** — Where an issue is raised as to whether or not a deed absolute on its face was intended as a mortgage, a finding that it was executed in payment of a debt will not be disturbed, if the evidence as to its character is conflicting. — *Ross v. Brusie*, 462.
2. **BOOKS OF ACCOUNT — EVIDENCE TO SHOW CREDIT HAS BEEN GIVEN.** — The plaintiff, being indebted to the defendant on a book-account, conveyed to the latter the land in controversy in consideration of an agreement by him to give the former credit for a specified amount on his account. At the trial, the court, against the objection of the plaintiff, permitted the defendant to introduce his account-books in evidence to show that the credit had been given. *Held*, that the books were properly admitted. — *Id.*
3. **CORPORATION — EXECUTION OF — AUTHORITY OF OFFICERS — PRESUMPTION.** — A mortgage executed in the name of a corporation by its president and secretary, and having the corporate seal attached, is presumed to have been executed in pursuance of a due authorization to such officers, and the burden of proof is on the corporation to show the contrary. — *Schallard v. Eel River Steam Navigation Company*, 144.
4. **RESOLUTIONS — PROOF OF EXISTENCE — VALIDITY OF MORTGAGE.** — Where the circumstances surrounding the execution of the mortgage show the existence of proper resolutions of authorization, and support the presumption of its authoritative execution, as shown by affixing the corporate seal and the signatures of the proper officers, the mere fact that such resolutions do not appear in the proper book of the corporation is not sufficient to disprove their existence and invalidate the mortgage. — *Id.*
5. **COUNSEL FEES — RESOLUTION MUST PROVIDE FOR.** — In an action for the foreclosure of a mortgage against a corporation, the plaintiff is not entitled to recover counsel fees if the resolution of the corporation authorizing the execution of the mortgage did not provide that the payment of counsel fees should be secured by it. — *Id.*

See **AMENDMENTS, 2; FRAUDULENT CONVEYANCE, 7; GROWING CROPS; MARRIED WOMEN, 2; SPECIFIC PERFORMANCE, 2, 3.**

MUNICIPAL CORPORATIONS.

1. PROCEEDINGS FOR ESTABLISHMENT OF — NOTICE OF ELECTION — CITY OF THE SIXTH CLASS. — The notice of the election for the incorporation of the defendant recited that "a petition having been duly presented to the board of supervisors of the county of San Bernardino, signed by at least one hundred qualified electors of the county resident within the limits of the proposed corporation, which petition particularly set forth the boundaries of this proposed corporation, and stated the number of inhabitants therein to be about three thousand." Held, that the notice was sufficient to indicate to the voters that the proposed city would be of the sixth class, under the act of March 13, 1883. — *People ex rel. Bettner v. City of Riverside*, 461.
2. INCLUSION OF LANDS NOT BENEFITED. — The propriety of establishing a municipality, and of including within its boundaries a particular territory, is in general a political question for the legislative department of the government; and if the course pursued in establishing a given municipality substantially complies with the statute, the courts will not interfere on the ground that certain territory would not derive any benefit from being included therein. — *Id.*

See LICENSE; STREET ASSESSMENT.

MURDER AND MANSLAUGHTER. See CRIMINAL LAW, 24-28.

NEGLIGENCE.

1. EMPLOYER AND EMPLOYEE — FELLOW-SERVANT. — The action was brought to recover damages for personal injuries. The plaintiff was an employee in a mine owned by the defendants. The shaft of the mine was divided by a frame-work of posts into two compartments, one of which was provided with a ladder-way for the use of the employees. The plaintiff, while ascending the ladder, was injured by a timber which had been negligently thrown by a fellow-employee into the shaft. Held, that the defendants were not liable, although the partition between the compartments may have been defectively constructed or insufficient in other particulars. — *Kevern v. Providence Gold and Silver Mining Company*, 392.
2. ATTORNEY — ACTION TO RECOVER FOR — STATUTE OF LIMITATIONS. — Under section 339 of the Code of Civil Procedure, a cause of action against an attorney for neglect of duty in the management of an action is barred at the expiration of two years after the neglect occurred. — *Hays v. Ewing*, 127.
3. OMISSION TO TAKE USELESS APPEAL. — It is not a neglect of duty for an attorney to omit to take an appeal on behalf of his client from a judgment rendered against him, if such appeal could not have availed the client. — *Id.*

See COMMON CARRIER, 8, 10; EMPLOYER AND EMPLOYEE; FORECLOSURE SALE, 2.

NEGOTIABLE INSTRUMENTS. See PROMISSORY NOTE.

NEW TRIAL.

1. NEWLY DISCOVERED EVIDENCE.—Where the evidence given on the trial is conflicting, newly discovered evidence merely cumulative will not warrant a new trial.—*People v. Fong Ah Sing*, 8.
2. MISCONDUCT OF SHERIFF—TREATING JURYMEN TO LIQUORS.—Pending the trial, and while the jury was in his charge, the sheriff conducted the jurymen to public saloons, and furnished them with liquor at his own expense. A reward had been offered for the conviction of the defendants, which the sheriff hoped to obtain. *Held*, that the conduct of the sheriff was a sufficient irregularity to warrant a new trial.—*People v. Myers*, 582.
3. NOTICE OF INTENTION—STRIKING OUT—WANT OF DILIGENCE.—A notice of intention to move for a new trial cannot be stricken out for want of diligence in prosecuting the motion,—*Heilbron v. Heinlen*, 482.
4. STATEMENT—PRESENTATION FOR SETTLEMENT—TIME FOR.—The defendant, having duly served his proposed statement on motion for a new trial, to which the plaintiff had duly served amendments, presented the same to the judge for settlement fourteen days after the service of the amendments. No notice was given to the plaintiff of the presentation. The judge refused to settle the statement because it had not been presented in time, and because no notice of the presentation had been given. The defendant thereupon engrossed the statement, embodying therein all of the proposed amendments, and presented it to the judge for settlement thirty days after the former presentation. *Held*, that the engrossed statement was a new statement, and that the judge had no authority to settle and allow it, as the time for the service of a statement had passed.—*Wills v. Kong*, 548.
5. TIME FOR PREPARATION OF STATEMENT—EXTENSION OF BY COURT.—Under section 1054 of the Code of Civil Procedure, where the time for the preparation of a statement on motion for a new trial has been extended by stipulation between the parties, the court has power to grant a further extension, not exceeding thirty days, if the application therefor be made before the time as extended by stipulation has expired.—*Curtis v. Superior Court of Yolo County* 390.

See APPEAL, 6; FINDINGS, 4, 8.

NON-RESIDENTS. See ESTATE OF DECEDEDENT, 1, 5.

NONSUIT.

1. PROMISSORY NOTE—ACTION ON—PROOF OF INDORSEMENT—PRACTICE—OPENING CASE AFTER RESTING.—The action was brought on a promissory note by an indorsee. The complaint alleged the execution of the note, its assignment to the plaintiff by the payee, and that he was the owner and holder thereof. The answer admitted the execution of the note, but denied every other allegation of the complaint. On the trial the plaintiff offered the note in evidence, proved that no part of it had been paid, and rested without any proof of the indorsement. The defendant then moved for a nonsuit on the ground that there was no proof of the in-

NONSUIT (Continued).

dorsement. The plaintiff's counsel contended that no such proof was necessary, but upon an intimation of the court to the contrary, asked leave to open the case and introduce evidence of the indorsement. This the court refused to allow, and granted the motion for nonsuit. The nonsuit, if allowed to stand, would have compelled the plaintiff to bring a new action, to which the statute of limitations would be a bar. *Held*, that under the circumstances the rulings of the court were erroneous.—*Low v. Warden*, 19.

See **SLANDER**, 3.

NOTARY PUBLIC. See **SUMMONS**, 5.

NOTICE. See **AGENCY**, 10, 13; **ASSOCIATIONS**, 2; **ESTATE OF DECEDENT**, 13; **EXECUTION**, 2; **GUARDIAN AND WARD**, 1; **JUSTICE'S COURT**, 2; **LANDLORD AND TENANT**; **MECHANIC'S LIEN**, 4; **MINES AND MINING**, 1; **MUNICIPAL CORPORATIONS**, 1; **NEW TRIAL**, 3.

NUISANCE.

1. **OVERHANGING TREES — ABATEMENT.**—Trees whose branches extend over the land of another are only a nuisance to the extent that the branches overhang the adjoining land. To that extent they are nuisances, and the person over whose land they extend may cut them off, or have his action for damages and an abatement of the nuisance; but he cannot cut down the trees, nor remove the branches thereof except so far as they overhang his soil. If he is damaged by the roots of the trees projecting into his land, they may also be abated.—*Grandona v. Lovdal*, 161.
2. **PLEADING — ACTION FOR ABATEMENT AND DAMAGES — MISJOINDER OF CAUSES OF ACTION.**—A complaint which seeks to abate an alleged nuisance, and to recover damages for injuries caused thereby, is not demurrable for misjoinder of causes of action.—*Id.*
3. **DAMAGES — SPECIFIC ALLEGATIONS OF — AMBIGUITY.**—Where the complaint alleges that the nuisance has occasioned several distinct injuries to the plaintiff, the amount of the damage caused by each injury must be averred; otherwise the complaint will be ambiguous and uncertain.—*Id.*

OAKLAND. See **STREET ASSESSMENT**, 1, 6.

OATH. See **PUBLIC LANDS**, 10.

OBLOQUY. See **LIBEL**.

OBTAINING PROPERTY UNDER FALSE PRETENSES. See **CRIMINAL LAW**, 29-34.

OFFER. See **CONTRACT**, 8; **VENDOR AND VENDEE**, 1.

OLOGRAPHIC WILL. See **ESTATE OF DECEDENT**, 6-8.

OPINION. See FALSE REPRESENTATIONS, 2.

ORDINANCE. See LICENSE; VAN NESS ORDINANCE.

OUSTER. See TENANTS IN COMMON, 1, 2.

OWNERSHIP. See FRAUDULENT CONVEYANCE, 4; PARTNERSHIP, 5.

PARTIES.

QUIETING TITLE — ESTATE OF DECEDEDENT — PERSONAL REPRESENTATIVE AND HEIRS ARE PROPER PARTIES.— In an action to quiet title to land against the estate of a deceased person, both the personal representative of the decedent and his heirs at law are proper parties defendant. — *Louvall v. Gridley*, 507.

See AMENDMENTS, 1-3; DEMURRER, 2; TRUST, 2.

PARTITION. See ESTOPPEL; TRUST, 1, 2.

PARTNERSHIP.

1. ACCOUNTING — SURVIVING PARTNER CANNOT MAINTAIN ACTION FOR. — A surviving partner cannot maintain an action against the personal representative of his deceased partner for an accounting of the partnership affairs. — *McKay v. Joy*, 581.
2. PLEADING — DESIGNATION OF PLAINTIFFS AS PARTNERS — CERTIFICATE OF PARTNERSHIP — IMMATERIAL ISSUE — FINDING. — Where the title of an action designates the plaintiffs as partners doing business under a fictitious name, but it does not appear either by the complaint or answer that the cause of action of the plaintiffs is upon or on account of any contract made or transaction had by them in their partnership name, an allegation in the answer that the plaintiffs had not complied with the law requiring the filing and publishing of a notice of the partnership is immaterial, and no finding thereon is necessary. — *Lee v. Orr*, 398.
3. PUBLICATION OF CERTIFICATE — ASSIGNEE MAY MAINTAIN ACTION WITHOUT. — The sections of the Civil Code prohibiting persons doing business as partners from maintaining any action upon or on account of any contracts made or transactions had in their partnership name, until they have filed and published a certificate showing the names and residences of all the members of the partnership, does not preclude the assignee of such partners from maintaining an action thereon. — *Wing Ho v. Baldwin*, 194.
4. NOTICE OF DISSOLUTION — EVIDENCE. — A notice published in a newspaper of the dissolution of a firm, and of the continuance of the business by one of the partners, is admissible in evidence to show who conducted the business after the dissolution, and in whose possession the firm property remained. — *Kelly v. Murphy*, 560.
5. OWNERSHIP OF BUSINESS — EVIDENCE. — As tending to show that a particular business was conducted by a deceased person ostensibly for himself and in his name, and not for or in the name of another, evidence that the goods used in the business were sold to

PARTNERSHIP (Continued).

him in his own name and charged to him individually is admissible. — *Id.*

See **ASSIGNMENT FOR BENEFIT OF CREDITORS; INSOLVENCY**, 1.

PATENT. See **BOUNDARIES, 2; PUBLIC LANDS, 9, 10, 12-14.**

PAYMENT. See **ADVERSE POSSESSION, 1; AGENCY, 13; CONTRACT, 3; ESTATE OF DECEASED, 20; MARRIED WOMEN, 1; MECHANIC'S LIEN, 1, 3; MINER'S LIEN, 1; SPECIFIC PERFORMANCE, 4; STREET ASSESSMENT, 6; SWAMP LANDS, 4.**

PENALTY. See **FORFEITURE.**

PLACE OF TRIAL.

1. **CHANGE OF VENUE — DISQUALIFICATION OF JUDGE — RECEIPT OF GENERAL RETAINER.** — A change of the place of trial may be had on the ground that the judge of the court in which the action was brought had received a general retainer from one of the parties. — *Kern Valley Water Company v. McCord; Lux v. Stine Canal Company; Miller v. McCord*, 646.
2. **APPEAL — ORDER REFUSING CHANGE OF VENUE — STAY OF PROCEEDINGS.** — Under section 949 of the Code of Civil Procedure, an appeal from an order refusing to change the place of trial does not operate to stay proceedings in the lower court. — *Howell v. Thompson*, 635.
3. **JUDGMENT RENDERED BEFORE REVERSAL OF ORDER.** — Where an order refusing to change the place of trial is reversed on appeal, a judgment rendered against the appellant before the reversal of the order will be reversed on an appeal therefrom without inquiring as to the commission of errors on the trial, although the appellant may have appeared at the trial and contested the right of the respondent to recover. — *Id.*

PLEADINGS.

1. **ALLEGATION OF TIME OF PROMISE — EVIDENCE.** — In an action to enforce a promise alleged to have been made by the defendant on a certain day, the plaintiff is entitled to recover upon proof that the promise was made at any time before the commencement of the action. He need not prove that it was made on or about the time alleged in the complaint. — *Biven v. Bostwick*, 639.
2. **ALLEGATION OF COVERTURE — EVIDENCE.** — The action was brought to recover damages for the conversion of certain personal property alleged to belong to the estate of one William Wearman. The defendant was sued by the name of Margaret Murphy. In her answer, she alleged "that her true name is Margaret Murphy Wearman"; that she owned and possessed the property in controversy in her own separate right, "and controlled the same as her separate property independent of her husband, the said William Wearman." Held, that these allegations did not aver a coverture of the defendant and Wearman, and that evidence thereof was inadmissible. — *Kelly v. Murphy*, 560.

PLEADINGS (Continued).

See AMENDMENT; CONTRACT, 1, 2; CORPORATIONS, 2; COUNTER-CLAIM; DEMURRER; ESTATE OF DECEDENT, 3; EXECUTION, 4; EXECUTORS AND ADMINISTRATORS, 2; FINDINGS, 2; INJUNCTION, 5; INSOLVENCY, 1, 2; INSURANCE, 1, 4; MECHANIC'S LIEN, 2; MINER'S LIEN, 1; NUISANCE, 2, 3; PARTNERSHIP, 2; PUBLIC LANDS, 6-8, 13, 14.

POLICY. See INSURANCE.

POSSESSION. See ADVERSE POSSESSION; CONTEMPT, 4; CRIMINAL LAW, 12; FRAUDULENT CONVEYANCE, 3; LANDLORD AND TENANT, 1; MINES AND MINING, 1; STATUTE OF LIMITATIONS, 3; VENDOR AND VENDEE, 2.

POWER OF ATTORNEY. See AGENCY.

PRACTICE. See AFFIDAVIT OF MERITS; AMENDMENTS; APPEAL; BAIL; BILL OF PARTICULARS; CONTINUANCE; DEMURRER; DISCONTINUANCE; DISMISSAL; EXCEPTION; EXECUTION; FINDINGS; INSTRUCTIONS; JUDGMENT; JURY AND JURORS; NEW TRIAL; NONSUIT; PLEADINGS; REFERENCE; STAY OF PROCEEDINGS; STIPULATION; SUBPOENA; SUMMONS; VERDICT.

PRE-EMPTION. See PUBLIC LANDS, 12-14.

PREFERENCE. See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1.

PRESUMPTION. See BOUNDARIES, 2; CRIMINAL LAW, 37; DEDICATION, 3; ESTATE OF DECEDENT, 18; HUSBAND AND WIFE, 1; INJUNCTION, 4; INSURANCE, 5; MORTGAGE, 3; STREET ASSESSMENT.

PRINCIPAL AND AGENT. See AGENCY; SURETIES.

PROMISE. See PLEADINGS, 1.

PROMISSORY NOTE. See AGENCY, 1, 2; CRIMINAL LAW, 29, 30; NONSUIT; SPECIFIC PERFORMANCE, 1-3.

PROTEST. See STREET ASSESSMENT, 1, 3.

PUBLICATION OF SUMMONS. See PUBLIC LANDS, 3; SUMMONS, 1-5.

PUBLIC LANDS.

1. STATE LANDS—APPLICATION FOR PURCHASE—APPROVAL BY SURVEYOR-GENERAL—SUBSEQUENT REFERENCE OF CONTEST FOR TRIAL.—The approval by the surveyor-general of an *ex parte* application for the purchase of state land, if brought about by the fraudulent representations of the applicant, who had never been an actual settler upon the land, or entitled to purchase it, does not bar a subsequent applicant of his statutory right to have the contest between him and the prior applicant referred to the proper court for adjudication. —*Gould v. Lanterman*, 247.

PUBLIC LANDS (Continued).

2. ORDER FOR TRIAL — CERTIFICATE OF SURVEYOR-GENERAL. — *Eads v. Clarke*, 88 Cal. 481, affirmed to the effect that the Superior Court acquires jurisdiction of an action to determine such a contest, although the certified copy of the order for trial does not affirmatively show that the order was entered in a record-book in the office of the surveyor-general, if that officer certifies that the copy of the order is a copy of a document on file in his office. — *Id.*
3. STATE LAND — RIGHT OF PURCHASE — ACTION TO DETERMINE — DEFENDANT MAY BE SERVED BY PUBLICATION — JURISDICTION. — In an action to determine the right of conflicting claimants to purchase certain state land, brought in pursuance of an order of reference made by the surveyor-general, the Superior Court acquires jurisdiction of the person of a non-resident defendant by the service of summons upon him by publication. By applying to purchase the land, the defendant must be held to consent to this mode of service in advance. — *Lobree v. Mullan*, 150.
4. CONTEST AS TO RIGHT TO PURCHASE — CONCLUSIVENESS OF JUDGMENT. — In hearing and determining a contest between rival claimants of the right to purchase public lands of the United States, the officers of the land department act judicially; and their judgments cannot be collaterally assailed in an action at law. — *Plummer v. Brown*, 544.
5. TITLE ACQUIRED BY FRAUD — TRUST — ACTION TO COMPEL CONVEYANCE OF LEGAL TITLE. — If the successful claimant has acquired, pursuant to the judgment, the legal title affected with any fraud or trust in relation to it, he will be regarded in equity as a trustee of the true owner, who may by a proper proceeding compel a conveyance to himself of the legal title. — *Id.*
6. PLEADING — EVIDENCE. — In an action by the unsuccessful claimant to compel a conveyance of the legal title, the plaintiff must distinctly allege and clearly prove that he occupies such a *status* as gives him the right to control the legal title. — *Id.*
7. The action was brought by an unsuccessful claimant of the right to purchase certain public land of the United States under the pre-emption and homestead laws, against the successful claimant, to compel the latter to convey the legal title to the plaintiff. The complaint showed that in the contest as to the right to purchase, the land department had decided that the defendant settled upon and occupied the land before the plaintiff entered upon it, and had not abandoned his occupation, and that the plaintiff invaded the occupation of the defendant, and was not a qualified pre-emptor. Held, that the plaintiff was not in a position to control the legal title issued to the defendant. — *Id.*
8. INSUFFICIENT ALLEGATIONS OF FRAUD. — In order to avoid the conclusiveness of the judgment of the land department, the complaint alleged in general terms that the judgment was based upon certain false, perjured, incompetent, and irrelevant evidence introduced by the defendant, but did not state what the evidence was. Held, that the complaint was insufficient. — *Id.*
9. SETTLERS UPON UNSURVEYED — AGREEMENT FOR CONVEYANCE WHEN VOID. — An agreement between settlers upon unsurveyed public

PUBLIC LANDS (Continued).

lands of the United States to the effect that, after their respective lands should be surveyed and patents obtained therefor, each would convey to the other such land embraced in the patent to him as was in the possession of the other at the time of the agreement, is void under section 2263 of the United States Revised Statutes, unless the parties are settlers and have their improvements upon the same legal subdivision. — *Turner v. Donnelly*, 597.

10. CONCLUSIVENESS OF PATENT — FALSE OATH OF APPLICANT TO PRE-EMPT. — A patent for public lands of the United States issued to a pre-emptor cannot be collaterally attacked on account of the false oath of the patentee in making his application to pre-empt the land. — *Id.*
11. SCHOOL LANDS — ACT OF APRIL 26, 1858 — EXCESSIVE SALE — CERTIFICATE OF PURCHASE. — Under the act of April 26, 1858, except in certain cases specified therein, a sale of school lands to one person containing more than 160 acres is void, and a certificate of purchase therefor issued by the sheriff conveys no title. — *Hicken v. French*, 430.
12. INDEMNITY SCHOOL LANDS — DEFECTIVE SELECTIONS — CONFIRMATION OF STATE — PREVIOUS SETTLEMENT — GOOD FAITH OF SETTLER — DECISION OF INTERIOR DEPARTMENT. — Under the act of Congress of March 1, 1877, confirming to the state the title to indemnity school lands the selections of which were defective or invalid, but excepting from the confirmation lands on which a *bona fide* pre-emption or homestead settlement had been made previous to the certification to the state, the question of the *bona fides* of such a previous settlement is one of fact, or of mixed law and fact, and the decision of the department of the interior thereon in a case involving the question is final. — *Green v. Hayes*, 276.
13. PATENTEE FROM STATE — ACTION TO QUIET TITLE AGAINST — ALLEGATIONS OF FRAUD. — In an action by an alleged pre-emptor of such land, claiming title under a previous settlement, to quiet his title, as against a patentee from the state, and to have the title of the latter declared void on the ground that his application to purchase the land from the state was fraudulent, the facts constituting the fraud must be specifically alleged in the complaint. — *Id.*
14. DEFECTIVE APPLICATION TO PURCHASE — IMPEACHMENT OF PATENT — STATE TITLE. — In such an action, the plaintiff cannot question the validity of the patent to the defendant on the ground that his application to purchase was defective or irregular, because he is not seeking to obtain the title of the state. — *Id.*

See BOUNDARIES, 2; WATER AND WATER RIGHTS, 2.

PUBLIC MESSENGER. See COMMON CARRIER, 5.

PUBLIC OFFICERS. See COUNTY TREASURER; IMMIGRATION COMMISSIONER; PUBLIC POLICY; ROAD OVERSEER.

PUBLIC POLICY.

PUBLIC OFFICER — DEPUTY SHERIFF — AGREEMENT TO COMPENSATE. — An agreement to compensate a deputy sheriff for procuring evidence which would lead to the conviction of a person implicated in

PUBLIC POLICY (Continued).

a certain crime is not contrary to public policy if the crime was committed and the trial had in a county other than that in which the deputy sheriff was an officer.—*Harris v. More*, 502.

PUBLIC SQUARES. See **VAN NESS ORDINANCE**.

PUBLIC USE. See **DEDICATION**, 1, 2, 4.

PURCHASE PRICE. See **FORFEITURE**; **FORECLOSURE SALE**, 1; **FRAUDULENT CONVEYANCE**, 7; **SPECIFIC PERFORMANCE**, 5; **VENDOR AND VENDEE**, 3, 4.

QUIET ENJOYMENT. See **LEASE**, 1-6.

QUIETING TITLE. See **AMENDMENTS**, 2; **PARTIES**; **PUBLIC LANDS**, 13, 14; **SUMMONS**, 6.

RAILROAD. See **COMMON CARRIER**, 2-5, 7; **VENDOR AND VENDEE**, 1.

RAPE. See **CRIMINAL LAW**, 35-37.

RATIFICATION. See **FRAUDULENT CONVEYANCE**, 4.

RECEIVER. See **CORPORATIONS**, 2.

RECITAL. See **CRIMINAL LAW**, 20, 28; **ESTATE OF DECEDENT**, 13; **SUMMONS**, 4; **TAX DEED**.

RECLAMATION. See **SWAMP LANDS**.

RECORDING. See **AGENCY**, 10; **CONTRACT**, 4; **LICENSE**, 6.

RECORDS. See **EVIDENCE**, 11, 12; **STREET ASSESSMENT**, 5, 7.

RECOUPMENT. See **LEASE**, 5.

REFERENCE.

1. **PRACTICE**—**WANT OF DILIGENCE IN PROSECUTION**—**DISMISSAL**.—The reference of an action for trial and judgment does not deprive the court of power to order its dismissal for want of diligence in its prosecution before the referee.—*Saville v. F'risbie*, 87.
2. The action was commenced on the 31st of March, 1860. On the 15th of May, 1861, it was referred to a referee to report a judgment. In the years 1862 and 1863, the plaintiff introduced a portion of his evidence, but no further steps were taken in the matter until June, 1883. In August, 1888, the original plaintiff died, and on the 24th of February, 1881, his administrator was substituted in his place. The administrator knew of the condition

REFERENCE (Continued).

of the action for at least ten years before his substitution. On the 5th of November, 1883, the court made an order dismissing the action for want of diligence in its prosecution. *Held*, that the order was proper.—*Id.*

REFORMATION. See FALSE REPRESENTATIONS, 1.

RELEASE. See AGENCY, 1.

RENT. See LEASE, 5, 6.

RESCISSION. See FRAUDULENT CONVEYANCE, 5; VENDOR AND VENDEE, 3

RES GESTÆ. See CRIMINAL LAW, 18.

RESIGNATION. See ESTATE OF DECEDEDENT, 17, 18.

RESISTANCE. See CRIMINAL LAW, 35-37.

RESOLUTION. See MORTGAGE, 4, 5.

RESTRAINING ORDER. See INJUNCTION, 1.

RETAINER. See PLACE OF TRIAL, 1.

REVENUE. See TAXATION.

REVOCATION OF AUTHORITY. See AGENCY, 2-5; CONTRACT, 8.

RIPARIAN PROPRIETORS. See WATER AND WATER RIGHTS.

ROAD OVERSEER.

DUTY OF SUPERVISORS TO APPOINT—APPOINTMENT CANNOT BE COMPELLED BY MANDAMUS.—The provision of section 2642 of the Political Code, as amended in 1883, requiring the board of supervisors of each county, upon the petition of a majority of the taxpayers of a road district, to appoint a road overseer therefor, is merely directory, and a writ of mandate will not lie to compel the board to appoint a particular person to such office.—*Davison v. Board of Supervisors of Solano County*, 612.

ROBBERY. See CRIMINAL LAW, 39.

RULE OF COURT. See JURY AND JURORS, 1.

SACRAMENTO. See TAXATION.

SALE. See STATUTE OF FRAUDS; TAX DEED.

SAN FRANCISCO. See VAN NESS ORDINANCE.

SCHOOL LANDS. See PUBLIC LANDS, 11-14.

SEAL. See MORTGAGE, 3, 4.

SEASHORE. See BOUNDARIES, 1.

SERVANT. See EMPLOYER AND EMPLOYEE; MASTER AND SERVANT; NEGLIGENCE, 1.

SETTLERS. See PUBLIC LANDS.

SHERIFF. See NEW TRIAL, 2; PUBLIC POLICY.

SLANDER.

1. WORDS IMPUTING WANT OF CHASTITY.—The action was brought to recover damages for an alleged slander. The complaint averred that the defendant said of and concerning the plaintiff, that "she was a bad woman, and that you had better have nothing to do with her case, as it is a very bad one; that she had not lived with her husband for two years previous to his death, and that she was the cause of her husband's death; that she had driven him to drinking, and that her husband fell while drunk, and was killed." It was further alleged that the words signified, and were understood by the hearer to mean, that the plaintiff had deserted her husband, and had, prior to his death, led an unchaste life, and had become *enceinte* while living apart from him, and that such bad conduct on her part drove him to drinking, and caused his death. *Held*, that the complaint stated a cause of action.—*Kedrolivansky v. Niebaum*, 216.
2. MEANING OF AMBIGUOUS WORDS—QUESTION FOR JURY.—In such a case, the words used being ambiguous, their meaning is for the jury to determine.—*Id.*
3. SLANDER OF TITLE—PRIOR ACTION TO DETERMINE TITLE—NON-SUIT.—In an action to recover damages for slander of title, the defendant is entitled to a nonsuit, if the evidence shows that the existence of the title alleged to have been slandered is in dispute in a prior action between the parties brought for the purpose of determining their rights.—*Thompson v. White*, 135.

See LIBEL.

SPECIAL ADMINISTRATOR. See ESTATE OF DECEDEDENT, 9, 10.

SPECIFIC PERFORMANCE.

1. CONTRACT MUST BE DEFINITE AND CERTAIN—EVIDENCE.—The specific performance of a contract cannot be had unless the thing agreed to be done is definite and certain in its terms and in itself, and the party claiming performance establishes by clear and satisfactory proof the existence of the contract as he alleges it.—*Magee v. McManus*, 553.

SPECIFIC PERFORMANCE (Continued).

2. CONTRACT FOR INDEMNITY — AGREEMENT TO EXECUTE NOTE AND MORTGAGE.—The action was brought to procure the specific performance of a parol contract. The complaint alleged that the plaintiff, having become liable as the accommodation surety for the defendant on two promissory notes, bearing a given rate of interest, entered into a contract with her whereby she promised, in consideration of his joining with her in the execution of a new note for six hundred dollars, payable six months after date, at a different rate of interest, to secure him against liability on the three notes by giving him her individual note secured by a mortgage upon her homestead property, the note to be made payable to him at the same time as the six-hundred-dollar note, in a sum equal to the whole amount then due on the three notes, and to bear the same rate of interest, and the mortgage to be made in such an amount as would secure him against any liability by reason of his becoming her surety. The court found the contract as alleged in the complaint, except that it was made in consideration of the plaintiff becoming surety on a note payable one year after date. *Held*, that specific performance of the contract could not be had, — 1. Because the contract as alleged in the complaint and as found by the court differed in the consideration; and 2. Because the contract was indefinite and uncertain both as to the time of payment of the note and mortgage, and as to the amount for which the mortgage was to be given, and the rate of interest on the note. — *Id.*

3. WAIVER OF RIGHT TO SPECIFIC PERFORMANCE.—The plaintiff performed his part of the contract, but there was no subsequent ascertainment or agreement as to the amount and terms of the mortgage; nor did he make any demand on the defendant for a performance on her part until after the debt for which he was surety became due, at which time the contract in its original shape could not be performed. *Held*, that the plaintiff had waived his right to a specific performance of the contract. — *Id.*

4. SURETY — RIGHTS OF AFTER PAYMENT — INSOLVENCY OF PRINCIPAL — HOMESTEAD — EXCESSIVE VALUE.—The complaint alleged and the court found that the defendant was insolvent, but owned certain premises which she claimed as a homestead. The notes on which the plaintiff was surety were otherwise unsecured. *Held*, that upon the payment of the notes by the plaintiff, his remedy was by an action at law against the defendant to recover the amount that he had paid, and that the judgment therein might be enforced against the homestead premises to the extent that they exceeded in value the amount allowed by the statute. — *Id.*

CONTRACT FOR SALE OF LAND — INADEQUACY OF CONSIDERATION — WAIVER.—A vendor, under a contract for the sale of land, by accepting the purchase-price agreed to be paid therefor, and delivering a deed in which a portion of the land was fraudulently omitted, though supposed by the vendee to include the whole, waives his right to object to a specific performance of the contract on the ground of the inadequacy of the consideration. — *Nicholson v. Tarpey*, 608.

See ESTATE OF DECEDEDENT, 17.

STAGE COMPANY. See COMMON CARRIER, 8, 10.

STATE LANDS. See PUBLIC LANDS.

STATEMENT OF CASE. See NEW TRIAL, 4, 5.

STATUTE OF FRAUDS.

SALE — CONTRACT FOR SALE OF HORSES — ACCEPTANCE AND RECEIPT OF PART. — The defendants agreed verbally to sell the plaintiff one hundred unbroken horses, at a specified price each, out of a band of horses belonging to them, then running at large. The contract provided that the defendants were to gather up a number of the horses of the band from time to time, from which the plaintiff was to select a certain number, and commence breaking them, after which the number so selected and broken were to be turned into the defendants' pasture, and another selection made in like manner until the whole number agreed to be sold should be gathered up, selected, and broken. Thereupon the horses were to be paid for by the plaintiff, and then taken by him from the premises of the defendants. The defendants gathered up a number of the horses, from which the plaintiff selected twenty-two, which he broke, and turned into the pasture of the defendants. Thereafter the defendants refused to further perform their part of the contract. *Held*, that the contract was void under the statute of frauds. — *Terney v. Doten*, 399.

STATUTE OF LIMITATIONS.

1. **DEBTOR AND CREDITOR — WRITTEN ACKNOWLEDGMENT OF DEBT — AGREEMENT TO ARBITRATE.** — A written agreement between a debtor and creditor for the arbitration of a disputed indebtedness, which recites in general terms the fact of indebtedness, and contains a promise by the debtor to pay the amount of the award, whether made before or after the statute of limitations has run against the demand, is not sufficient to defeat the bar of the statute in an action brought on the original indebtedness after the statute has run. — *Curtis v. City of Sacramento*, 412.
2. **WATER RIGHTS — ADVERSE POSSESSION AND USER — CLAIM OF RIGHT.** — An adverse possession and user of water for five years continuously and uninterruptedly, with the knowledge of and to the injury of the true owner, will bar the right of the latter thereto; but a mere claim of right to the use and enjoyment of the water, however long continued, will not have that effect. — *Cox v. Clough*, 345.
3. **DENIAL OF RIGHT TO POSSESSION.** — The mere denial by the owner of the right of the adverse user to the possession of the water is not a sufficient interruption thereof to prevent the statute of limitations from operating as a bar. — *Id.*
4. **FINDINGS — EVIDENCE.** — The findings on the plea of the statute of limitations examined, and *held* sufficient, and supported by the evidence. — *Id.*
5. **FINDINGS.** — A finding that all the allegations of the complaint are true is a sufficient finding on a plea of the statute of limitations, if the complaint contains averments showing that the statute had not run. — *Lewis v. Adams*, 403.

STATUTE OF LIMITATIONS (Continued).

6. IMMATERIAL ISSUE — FINDING.—The defendants pleaded section 337 of the Code of Civil Procedure in bar of the action. *Held.* that the section did not apply, and that no finding on the subject was required.—*Louvall v. Gridley*, 507.

See ADVERSE POSSESSION; ESTATE OF DECEASED, 4, 5; GUARDIAN AND WARD, 2; JUDGMENT, 2; NEGLIGENCE, 2; NONSUIT; TENANTS IN COMMON, 2, 3; TRESPASS; TRUST, 7.

STAY OF PROCEEDINGS. See PLACE OF TRIAL, 2.

STIPULATION. See EVIDENCE, 24, 25; NEW TRIAL, 5.

STOCKHOLDER. See CORPORATIONS, 2.

STREET ASSESSMENT.

1. CITY OF OAKLAND — MACADAMIZING PORTIONS OF STREET.—Under the statutes of 1864 and 1870, authorizing the city council of the city of Oakland to order the whole or any portion of the streets of the municipality macadamized, the city council has power to let the work of macadamizing separate portions of a street in one contract.—*Alameda Macadamizing Company v. Williams*, 534.
2. PROTEST AGAINST PROPOSED WORK — EVIDENCE — FINDINGS — JUDGMENT — PRESUMPTION.—The action was brought to foreclose an assessment for the macadamizing of a street in the city of Oakland. An issue was raised by the pleadings as to whether a majority of the property owners on the line of the street protested against the proposed work. On the trial, the court excluded the written protest offered in evidence by the defendant, but the plaintiff admitted the names of the protestants, and the number of front feet owned by each on the line of the work. Findings were waived, and judgment rendered in favor of the plaintiff. *Held*, that it would be presumed that a majority of the property owners on the line of the work did not protest.—*Id.*
3. *Held, further*, that the exclusion of the written protest was without prejudice to the defendant, as the admission of the plaintiff afforded him the benefit of the testimony which the protest would have furnished.—*Id.*
4. DESCRIPTION OF LAND — SIDE LINE OF STREET AS BOUNDARY.—In such an action, where the complaint describes the land assessed as bounded by the side line of the adjoining street, the presumption that the land extends to the center of the street is rebutted.—*Id.*
5. RECORD OF STREET ASSESSMENT — EVIDENCE.—Under section 18 of the act of April 4, 1864, the records of a street assessment kept by the marshal of the city of Oakland, and signed by him, have the same force and effect as other public records, and copies therefrom duly certified are admissible in evidence with the same effect as the originals.—*Id.*

STREET ASSESSMENT (Continued).

6. **DEMAND OF PAYMENT — ASSESSMENT TO UNKNOWN OWNERS.** — Under that act, where the land is assessed to unknown owners, the demand for the payment of the assessment must be publicly made on the premises; a demand made to the owner personally, or on the street in front of the premises, is insufficient. — *Id.*
7. **ACTION TO ENFORCE — RECORD OF SUPERVISORS — EVIDENCE TO IDENTIFY.** — In an action to enforce an alleged street assessment in the city and county of San Francisco, parol evidence is admissible to show that a certain document, offered by the plaintiff as the record of the board of supervisors ordering the work upon which the assessment was founded to be done, was not in fact a record of the board, and that the true record did not authorize the work. — *Dyer v. Brogan*, 136.

STREET AND HIGHWAY. See **DEDICATION; INJUNCTION, 2; STREET ASSESSMENT; SUMMONS, 3.**

SUBPENSA. See **CONTEMPT, 1; CONTINUANCE.**

SUBSCRIPTION. See **CONTRACT, 8.**

SUMMONS.

1. **PUBLICATION — AFFIDAVIT FOR — STATEMENT OF FACTS IN — JURISDICTION — JUDGMENT.** — Under section 412 of the Code of Civil Procedure, an affidavit for the publication of summons against a non-resident defendant, in a case where the complaint is unverified, must state the facts showing the existence of a cause of action against the defendant, and that he is a necessary or proper party to the action; otherwise the court does not acquire jurisdiction of the defendant by reason of the attempted service by publication, and a judgment by default founded thereon is void. — *County of Yolo v. Knight*, 431.
2. **STATEMENT OF LEGAL CONCLUSION INSUFFICIENT.** — In such a case, an affidavit which merely states that the plaintiff has a good cause of action against the defendant, and that he is a necessary and proper party defendant, is insufficient. — *Id.*
3. **ACTION TO CONDEMN LAND — PUBLIC HIGHWAY — PROCEEDINGS BEFORE SUPERVISORS.** — In an action to condemn land for a public highway, an affidavit for the publication of summons, where the complaint is unverified, must show that the proceedings before the board of supervisors have been had as provided in sections 2698 to 2708 of the Political Code. — *Id.*
4. **APPEAL FROM JUDGMENT — RECITALS IN FINDINGS — DEFENDANT NOT CONCLUDED BY.** — On an appeal from a judgment by default, rendered after an insufficient service of summons by publication, the defendant is not concluded by a recital in the findings that due proof had been made that the summons was legally served upon him, and his time for answering had expired. — *Id.*
5. **PROOF OF SERVICE — CERTIFICATE OF NOTARY PUBLIC.** — The service of a summons and complaint by a notary public must be proved by his affidavit; his mere certificate is insufficient. — *Id.*

SUMMONS (Continued).

6. PRACTICE — DEFENDANT SUED BY FICTITIOUS NAME — SETTING ASIDE SUMMONS — DISMISSAL.— In an action to quiet title to land, when the complaint alleges that the plaintiff is ignorant of the name of a defendant, who is sued and served with summons under a fictitious name, as provided by section 474 of the Code of Civil Procedure, the defendant so sued is not entitled to have the service of summons set aside and the action dismissed upon showing that the plaintiff could have ascertained his real name if he had exercised reasonable diligence in examining the public records of the county.— *Irving v. Carpentier*, 23.

See COUNTERCLAIM; PUBLIC LANDS, 3.

SUPERINTENDENT. See MINER'S LIEN, 3.

SUPERVISORS. See LICENSE, 3-6; ROAD OVERSEER; STREET ASSESSMENT, 7; SUMMONS, 3.

SUPPORT AND MAINTENANCE. See HUSBAND AND WIFE, 5.

SURETIES.

DISCHARGE FROM LIABILITY — PRINCIPAL AND AGENT.— The sureties on a bond for the faithful performance of the duties of an agent are released from liability for the subsequent defaults of the agent if the principal and agent, without the knowledge or consent of the sureties, materially alter the terms of the contract of agency, or if the principal continues the agent in his employ after knowledge that he has misappropriated money coming into his hands as agent.— *Roberts v. Donovan*, 108.

See SPECIFIC PERFORMANCE, 4.

SURPLUSAGE. See EXECUTORS AND ADMINISTRATORS, 2.

SURPRISE. See FORECLOSURE SALE, 2, 3.

SURVEY. See BOUNDARIES, 2.

SURVEYOR-GENERAL. See PUBLIC LANDS, 2.

SWAMP LANDS.

1. RECLAMATION — VIEW BY COMMISSIONERS — JOINT VIEW NOT NECESSARY.— Under section 3456 of the Political Code, the commissioners appointed to make an assessment for the reclamation of swamp land need not act jointly in viewing the lands within the district.— *Swamp Land District No. 307 v. Gwynn*, 566.

2. SUFFICIENCY OF VIEW — FINDING — EVIDENCE.— The court found that the lands in the district, and each and every tract thereof, were viewed by the commissioners. At the time of the view, the lands were mostly covered with water, but the commissioners were at a point where they could look over the whole area of the district and see every part of it, except a few small parcels along

SWAMP LANDS (Continued).

its eastern margin, which were hidden from view by trees. *Held*, that the finding was sustained by the evidence, and that the view was not insufficient in point of law. — *Id.*

3. **ASSESSMENT ROLL — EVIDENCE TO CONTRADICT — ARBITRARY ASSESSMENT.** — Conceding that the assessment roll of a swamp-land district, when properly certified by the commissioners, becomes a official record within the meaning of sections 1920 and 1926 of the Code of Civil Procedure, and evidence of all the facts recited in it, still it is only *prima facie* evidence, and may be contradicted by showing that the assessments were arbitrarily made without reference to the proportionate benefits to be derived to each piece of land assessed by reason of the proposed work. — *Id.*
4. **SATISFACTION OF ASSESSMENT — TENDER OF WARRANT OF DISTRICT.** — The defendants tendered in payment of the assessment a warrant of the district for a larger sum than the amount of the assessment. The warrant was owned by a third person, and was tendered only for the purpose of having the assessment indorsed thereon, and was not intended to be given up and canceled. *Held*, that the tender was not a satisfaction of the assessment under section 3465 of the Political Code. — *Id.*

TAXATION.

1. **REVENUE — ACT OF MAY 17, 1861 — CITY OF SACRAMENTO.** — Under the act of April 25, 1863, incorporating the city of Sacramento, the revenue act of May 17, 1861, became a part of the city charter so far as concerns the mode of assessing, levying, and collecting the municipal taxes. — *People v. Clunic*, 504.
2. **REPEAL OF ACT.** — The revenue act of May 17, 1861, so far as its operation as a general law is concerned, was repealed by section 18 of the Political Code; but so far as it was incorporated into and became a part of the charter of the city of Sacramento, it was continued in force. — *Id.*
3. **ASSESSMENT OF CITY LOTS.** — The assessment in question held invalid on the authority of *Terrill v. Groves*, 18 Cal. 149, the point there decided being that city lots must be separately assessed, and a separate valuation placed on each. — *Id.*

See **ADVERSE POSSESSION**, 1; **TAX DEED**.

TAX COLLECTOR. See **CRIMINAL LAW**, 38.

TAX DEED.

RECITAL — SALE — INVALIDITY OF DEED. — A tax deed which recites that the tax collector offered the land on which the tax was levied for sale as one parcel, instead of offering it to the person who would take the least quantity and pay the tax, is void. — *Frink v. Roe*, 298.

TELEGRAPH COMPANY. See **CONTEMPT**, 1.

TENANT. See **LANDLORD AND TENANT**.

TENANTS IN COMMON.

1. **ADVERSE POSSESSION — OUSTER.** — Where a tenant in common of land is in possession thereof, acknowledging or with knowledge of the rights of his co-tenants, there must be, in order to constitute an ouster by him of his co-tenants, such acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the co-tenants that an adverse possession and disseisin are intended to be asserted against them; and this rule applies wherever a co-tenant enters under a conveyance which purports to convey a moiety, or any portion less than the whole, or merely the interest of the grantor. — *Bath v. Valdez*, 350.
2. **DEED OF ENTIRETY — EXCLUSIVE POSSESSION UNDER — STATUTE OR LIMITATIONS.** — When a conveyance of land is made by a party in the exclusive possession under a deed which purports to convey the whole of the property, and the grantee enters into the open and notorious possession of the whole without notice of a co-tenancy, the entry will be presumed to be in the assertion of an exclusive right in severalty, and is equivalent to an express declaration on the part of the grantee that he enters claiming the whole for himself, and is therefore such a disseisin as sets the statute of limitations in motion in his favor and against his co-tenants. — *Id.*
3. **DECREE OF DISTRIBUTION — ESTOPPEL.** — Under such circumstances, the grantee is not estopped to set up the statute of limitations against the heirs of a former owner by reason of the fact that the decree of distribution of the estate of such owner distributed the land to the heirs. — *Id.*

See **ESTOPPEL**; **HUSBAND AND WIFE**, 3; **TRUST**, 1, 2.

TENDER. See **SWAMP LANDS**, 4.

TICKET. See **COMMON CARRIER**, 3, 4.

TITLE. See **ADVERSE POSSESSION**, 12; **AGENCY**, 8, 9; **CLOUD ON TITLE**; **CRIMINAL LAW**, 34; **EJECTMENT**, 1; **ESTOPPEL**; **LEASE**, 1; **PUBLIC LANDS**, 5-8, 13, 14; **QUIETING TITLE**; **SLANDER**, 3; **VAN NESS ORDINANCE**, 1; **VENDOR AND VENDEE**, 3, 4.

TOKEN. See **CRIMINAL LAW**, 32.

TOTAL LOSS. See **INSURANCE**, 3-5.

TRANSCRIPT. See **APPEAL**, 5, 7, 8; **BILL OF PARTICULARS**.

TREASURER. See **COUNTY TREASURER**.

TREES. See **NUISANCE**, 1, 2.

TRESPASS.

1. **TRESPASS BY CATTLE — LAND IN FRESNO AND TULARE COUNTIES — LIMITATION.** — In an action to recover damages for trespasses committed by cattle on land situated in Fresno or Tulare County, the

TRESPASS (Continued).

right of recovery is not limited to trespasses committed within sixty days prior to the commencement of the action.—*Heilbron v. Heinlen*, 482.

See **LEASE**, 3, 4.

TRIAL. See **CONTINUANCE**.**TRUST.**

1. **PARTITION — AGREEMENT BETWEEN CO-TENANTS — DECREE.**— Pending a suit for the partition of a ranch, the plaintiff, who owned an undivided interest therein, conveyed his interest, except a specified portion reserved to himself, to the defendants, a committee of trustees acting on behalf of a league formed of certain tenants in common of the ranch, of which the plaintiff was a member. At the time of the conveyance, the defendants executed and delivered to the plaintiff a writing by which they consented and agreed that he should have set off to him by the decree in the partition suit the portion so reserved, and that they would use their influence to secure the same to him. By a subsequent transaction, to which the plaintiff was not a party, the defendants acquired title to the undivided interest of one Gates, a tenant in common in the ranch. The interlocutory decree in the partition suit, after determining the respective rights of the parties, adjudged that the interest of the plaintiff should be set off to him within the boundaries of the reservation made in his deed to the defendants. That portion of the ranch contained 3138 acres. Eight hundred and twenty-six acres of it were allotted and set apart to the plaintiff as his ascertained and adjudged interest; the remainder was allotted and set apart to Gates as his ascertained interest; while the interest acquired by the defendants under their deed from the plaintiff was allotted and set apart to them in a portion of the ranch wholly outside of the reservation. The final judgment, from which no appeal was taken, confirmed these allotments. *Held*, that the legal title acquired by the defendants to the portion of the reservation allotted to Gates was not held in trust for the plaintiff.—*McBrown v. Dalton*, 89.
2. **ACTION TO ENFORCE TRUST — PARTIES.**—*Held further*, that the defendants held the legal title to the land, which they acquired from Gates and the plaintiff in trust for the members of the league, and that the plaintiff, as a member of the league, might enforce the trust in an action to which all the beneficiaries were parties, but not otherwise.—*Id.*
3. **EXPRESS TRUST — TERMINATION OF — CONVEYANCE BY TRUSTOR — ESTATE OF GRANTEE.**—The author of an express trust which does not provide to whom the trust property shall belong upon a failure or termination thereof may convey the property subject to the trust; and the grantee will acquire all the rights in and to the property that the trustor had.—*Schlesinger v. Mallard*, 326.
4. **TRUST FOR CEMETERY PURPOSES — LOS ANGELES — QUITCLAIM DEED — CONFIRMATION BY LEGISLATURE.**—The land in question was originally part of the pueblo lands of the city of Los Angeles. In 1857, the city set it apart as a public cemetery, and conveyed

TRUST (Continued).

it to the defendant and two others, since dead, in trust for the uses and purposes of a cemetery. A small portion of the land was used for such purposes until 1861, when the city resolved, by ordinance, to discontinue the use and to remove the bodies there buried. This was done, except that a few bodies buried in one corner were not removed. In 1870, the city, by a quitclaim deed, conveyed the land to the grantor of the plaintiffs, which conveyance was subsequently confirmed by an act of the legislature. *Held*, that the deed, in connection with the act of confirmation, transferred all the interest of the city in the land. — *Id.*

5. RESULTING TRUST. — *Held further*, that as to the portion of the land not used for the purpose of a cemetery, and as to which such use was discontinued, a trust resulted by operation of law in favor of the city and its grantees. — *Id.*

6. RIGHT OF TRUSTOR TO RECONVEYANCE. — The abolition of the cemetery by the city terminated the trust relation, and thereupon it became the duty of the trustees to reconvey the trust property. — *Id.*

7. TRUSTEE CANNOT HOLD ADVERSELY — STATUTE OF LIMITATIONS. — A trustee cannot be permitted to retain possession as such after repudiating the trust and claiming adversely. — *Id.*

8. SUBSTITUTION OF TRUSTEES — EQUITY. — A court of equity will substitute new trustees to manage the trust property when its safety or proper administration so requires, but will not do so if no good result is to be accomplished thereby. — *Id.*

9. GRANTEE OF TRUSTOR — CONVEYANCE TO BY TRUSTEE — DECREE. — The complaint, after setting up the trust and all the facts connected with it, alleged that the defendant had violated and repudiated it, had used the trust property for his own benefit, and that he was an unfit person to be trustee. The court found these allegations to be true, but instead of substituting a new trustee, it decreed that the defendant should convey the land to the plaintiffs, and provided that they should hold the lot in which the bodies were buried, subject to the public easement as a place of burial until the bodies were removed by proper authority. *Held*, that the decree was proper. — *Id.*

10. TRUST DEED — DELIVERY — SURRENDER BY TRUSTEE — CANCELLATION — EJECTMENT — EQUITABLE DEFENSE. — The action was brought to recover the possession of certain land originally owned by one Soto. The plaintiffs claim to have derived title to the demanded premises after the death of Soto, by a conveyance from the trustee and *cestui que trust* under a deed of trust alleged to have been executed by Soto, and empowering the trustee and beneficiary to convey in case of his death pending the trust. The answer alleged that the trust deed was never delivered by Soto to the trustee, but merely deposited with him for safe-keeping, with the understanding that it should be returned for cancellation on demand, and that with the consent of the beneficiary the deed was surrendered to Soto, and canceled by the destruction thereof. *Held*, that the answer was sufficient to constitute an equitable defense. — *Burroughs v. De Couts*, 361.

TRUST (Continued).

11. **ACQUIESCENCE BY BENEFICIARY — EVIDENCE — FINDING.** — The court found that the trust deed was surrendered with the intention and agreement that the trust therein provided for should cease, and the property be owned by Soto as if the deed had never been made; that the beneficiary, with full knowledge of the facts, acquiesced therein; and that it was intended that a proper deed should be executed reconveying the property to Soto and terminating the trust, but on account of neglect the deed was never executed. The evidence showed that upon the redelivery of the trust deed, it was for some time in the possession of the beneficiary, who was the wife of Soto; that during his lifetime he managed and possessed the property as his own; that at his death he devised only a portion of it to her, and the residue to his children; that she was appointed and acted as the executrix of his will, described the property as belonging to his separate estate, submitted to a division of it as in the will provided, sold her interest in it as devised to her, and never asserted any claim under the trust deed until after twenty-four years. *Held*, that the finding was within the issues and sustained by the evidence. — *Id.*
12. **ELECTION — CONFLICTING INTERESTS.** — *Held further*, that the evidence was sufficient to sustain a finding that the beneficiary elected to take under the will, and not under the trust deed. — *Id.*
13. **TRUST IN PERSONAL PROPERTY — MAY BE CREATED BY PAROL.** — An express trust in personal property may be created without a written transfer. — *Hellman v. McWilliams*, 449.
14. **RESERVATION OF RIGHT BY TRUSTOR.** — A verbal transfer of money in trust for the use and benefit of the children of the trustor, reserving to the latter the right to draw from the trust fund such sums as he might deem proper for his own use, is valid. — *Id.*
15. **REVOCACTION BY TRUSTOR.** — After a trust has been created and accepted, the trustor has no power to revoke it without the consent of the beneficiaries, unless such power was reserved in the declaration of the trust. — *Id.*

See HOMESTEAD, 1; LIBEL, 1; MARRIED WOMEN; MINES AND MINING, 4; PUBLIC LANDS, 5.

UNDUE INFLUENCE. See FRAUDULENT CONVEYANCE, 5.

USE. See PUBLIC USE.

VAN NESS ORDINANCE.

1. **SAN FRANCISCO — TITLE ACQUIRED BY — ADVERSE POSSESSION — PUBLIC SQUARES.** — *Hoadley v. City and County of San Francisco*, 50 Cal. 265, to the effect that the plaintiff acquired no title to the public squares in controversy, either by the Van Ness ordinance or by adverse possession, affirmed. — *Hoadley v. City and County of San Francisco*, 320.
2. **SELECTIONS FOR PUBLIC SQUARES — RATIFICATION OF BY ACT OF MARCH 11, 1858.** — The selections of land for public squares in the city of San Francisco made by the commissioners appointed under ordinances Nos. 822 and 845 of the common council, from

VAN NESS ORDINANCE (Continued).

land lying west of Larkin Street and southwest of Johnston Street, and designated as squares on the map of the commissioners approved by the board of supervisors on the 16th of October, 1856, were ratified and confirmed by the act of the legislature of March 11, 1858, and are consequently valid, although the selections embraced more than one block, and more than one twentieth of the land in the possession of one person, and the excess was taken without payment of compensation as provided in ordinance No. 822. — *Id.*

VARIANCE. See **CRIMINAL LAW**, 14, 15, 29.

VENDOR AND VENDEE.

1. **CONTRACT FOR SALE OF LAND — ACCEPTANCE OF OFFER CONTAINED IN CIRCULAR — RAILROAD LANDS.** — The action was brought to recover the possession of certain land forming part of the railroad lands of the plaintiff. The defendant settled upon the land, under the provisions of a printed circular issued by the plaintiff, inviting settlers to go upon its lands and occupy and use them until the company was ready to sell, and giving to such settlers the right to purchase on certain terms and conditions, all of which the defendant had complied with, except the completion of the purchase, which the plaintiff refused to permit. *Held*, that the acceptance by the defendant of the offer contained in the circular constituted a contract of sale, and established the relation of vendor and vendee between the plaintiff and the defendant, and that as the defendant was rightfully in possession, the plaintiff could not recover. — *Southern Pacific Railroad Company v. Terry*, 484.
2. **VENDEE WHEN NOT ENTITLED TO POSSESSION — IMPLIED LICENSE TO ENTER.** — Under a contract for the sale of land, which does not provide for the purchaser entering into possession, no license to enter is implied. — *Gates v. McLean*, 40.
3. **FAILURE OF TITLE OF VENDOR — RESCISSION BY VENDEE — LIABILITY FOR PURCHASE PRICE.** — Where the contract provides for the vendee taking possession, his remedy, in case the title of the vendor fails, or he is unable to make a conveyance as stipulated in the contract, is to rescind or offer to rescind the contract, and to restore the possession, in which event he may recover the purchase-money advanced, with interest thereon, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably be worth. If, on the contrary, the vendee chooses not to rescind, but to retain possession under the contract, he can do so only on condition that he pay the purchase-money and interest according to the contract. In the latter case, it is considered that he is willing to receive such title as the vendor is able to give, and is content with the personal responsibility of the vendor upon his covenants. — *Id.*
4. **CONTRACT FOR SALE OF LAND — PAYMENT OF PURCHASE PRICE — FAILURE OF TITLE.** — Money paid by the vendee as part of the purchase price under a contract for the sale of land may be recovered if the vendor did not have the title at the time the contract was made, nor acquire it afterwards. — *Sanders v. Lansing*, 429.

VENDOR AND VENDEE (Continued).

See ATTACHMENT; FALSE REPRESENTATIONS, 2; FORFEITURE; SPECIFIC PERFORMANCE.

VENUE. See PLACE OF TRIAL.

VERDICT. See CRIMINAL LAW, 1, 2, 5, 23, 28; EJECTMENT, 2; EVIDENCE, 3; INSURANCE, 5; JUDGMENT, 4; MALICIOUS PROSECUTION.

VEXATIOUS LITIGATION. See INJUNCTION, 5.

WAIVER. See AFFIDAVIT OF MERITS, 2; EVIDENCE, 26; EXECUTION, 1; FINDINGS, 8, 9; JURY AND JURORS, 1; JUSTICE'S COURT, 2; SPECIFIC PERFORMANCE, 3, 5.

WARD. See GUARDIAN AND WARD.

WARRANT. See SWAMP LANDS, 4.

WATER AND WATER RIGHTS.

1. RIPARIAN PROPRIETORS — USE OF WATERS OF STREAM — LEASE — ESTOPPEL.— An upper riparian proprietor who enters into an agreement, purporting to be a lease, with a lower proprietor, whereby the latter grants to him for a certain term the right to the use of the waters of the adjoining stream for domestic purposes and irrigation, is not, upon the expiration of the agreement, estopped from asserting his right as a riparian proprietor to the use of the water of the stream. — *Swift v. Goodrich*, 103.
2. PUBLIC LANDS — APPROPRIATOR MAY REMOVE OBSTRUCTIONS FROM STREAM.— An appropriator of the waters of a natural stream flowing through public lands of the United States has a right, as against a subsequent purchaser from the United States, to go upon the land of such purchaser higher up the stream than the point of diversion and remove obstructions from the bed of the stream, so as to cause its waters to flow in their natural channel to the point of diversion. — *Ware v. Walker*, 591.
3. RIPARIAN PROPRIETOR — USE OF STREAM — ORDINARY FLOW — APPROPRIATION — DIVERSION OF SURPLUS.— A riparian proprietor, who has appropriated and uses all the water of a stream crossing his land, as it ordinarily flows, cannot restrain the diversion, during times of extraordinary high water, of the surplus of the stream not used or appropriated by him. — *Edgar v. Stevenson*, 286.
4. APPROPRIATION — EQUITY — INJUNCTION.— A court of equity has power to ascertain and determine, as between several appropriators of the waters of a natural stream, the extent of the respective rights of each in the waters therein flowing, to regulate the use thereof in such a way as to maintain equality of rights in the enjoyment of the common property, and to enjoin a subsequent

WATER AND WATER RIGHTS (Continued).

appropriator from interfering with the rights of the prior appropriators as ascertained and established by the court.—*Frey v. Louden*, 550.

5. **WATER DITCH — EVIDENCE OF CAPACITY — EXPERTS.**—A witness who has had many years' practical experience in mining and measuring and selling water to miners, although not an expert in the science of measuring water, may testify to the carrying capacity of a particular water ditch.—*Id.*
6. **WATERCOURSES — RIGHTS OF PRIVATE OWNERS — ACT OF MAY 15, 1854.**—The act of May 15, 1854, creating a board of commissioners and the office of overseer in each township of the several counties of the state to regulate watercourses within their respective limits, and the acts amendatory thereof, do not authorize those officers to enter upon private watercourses, and to disturb the owners thereof in their use and enjoyment.—*Charnock v. Rose*, 189.

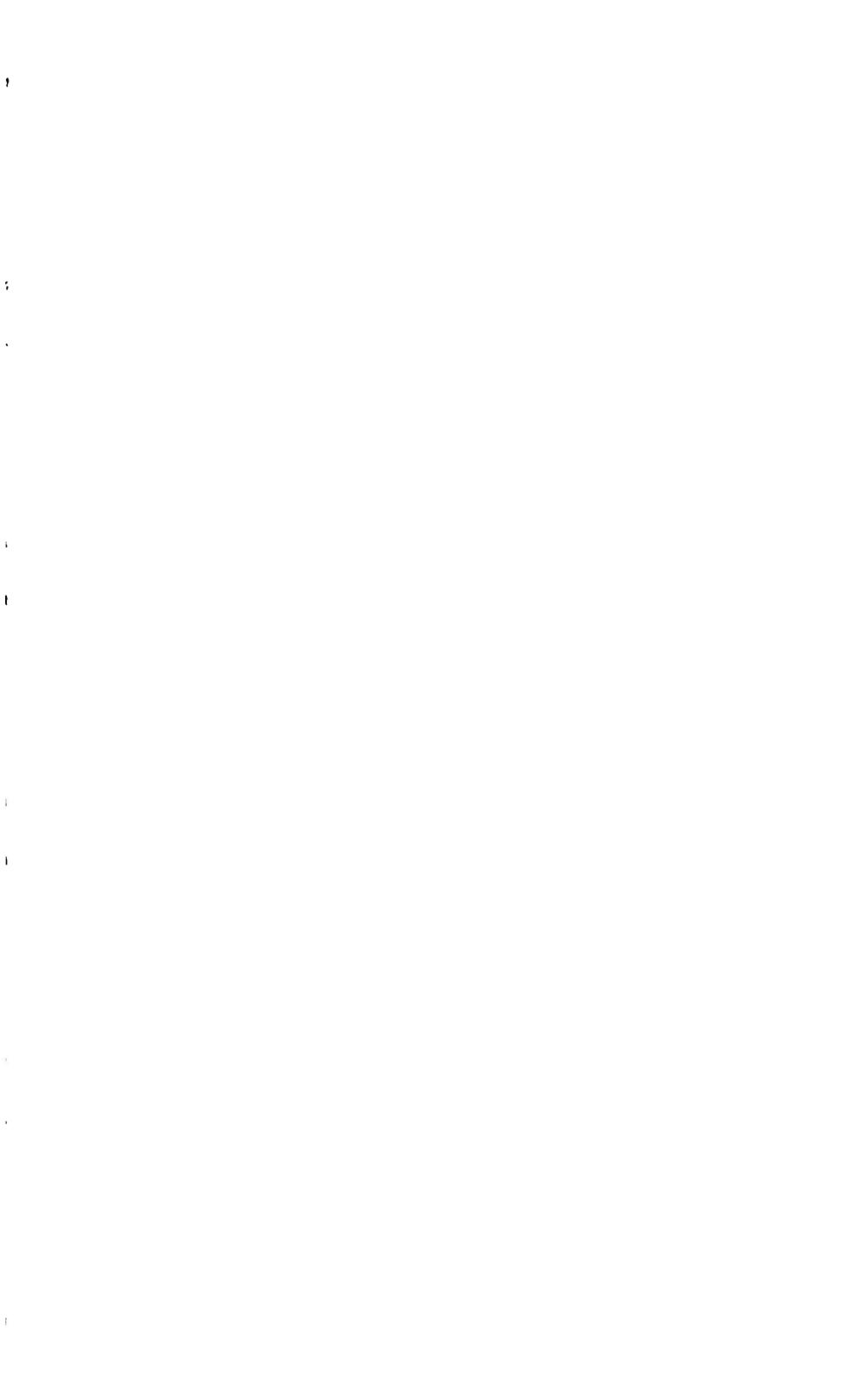
See **STATUTE OF LIMITATIONS**, 2, 3.

WILL. See **ESTATE OF DECEDENT**, 6-8.

WITNESS. See **CONTEMPT**, 2, 3; **CONTINUANCE**; **CRIMINAL LAW**, 21.







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